TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 251.

DANFORTH GIBBS, WILLARD B. GAY, ARTHUR W. [illegible] ET AL., APPELLANTS,

vs.

THE MATHIESON ALKALI WORKS, THE ASTHUR ELECTROLYTIC ALKALI COMPANY, EDWARD ARNOLD ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED [illegible], 1909.

29051

(18,434.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 261.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, ET AL., APPELLANTS,

vs.

THE MATHIESON ALKALI WORKS, THE CASTNER ELECTROLYTIC ALKALI COMPANY, EDWARD E. ARNOLD, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Notice of motion to remand	1	1
Affidavit of service of notice	2	1
Transcript from State court	4	2
Summons	4	2
Complaint	5	3
Bond for removal	30	15
Petition for removal	35	18
Opinion on motion to remand	39	20
Order denying motion to remand	40	21
Order to show cause	42	22
Affidavit of Alfred Ely	44	23
Willard U. Taylor	51	26
William F. Grell	60	31

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	Original.	Print
Affidavit of Edward E. Arnold	62	32
John R. Gladding	68	35
James M. Edwards	73	37
Alfred Ely	76	38
Willard U. Taylor	79	40
Arthur W. Smith	86	43
Order dismissing service of summons, &c	88	44
Order amending order dismissing service of summons	90	45
Order as amended, dismissing service of summons	91	45
Petition for appeal	93	46
Order allowing appeal	94	47
Assignment of errors	96	48
Bond	98	49
Copy of citation	102	51
Clerk's certificate	104	51

1 United States Circuit Court, Southern District of New York.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,
against
THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

SIRS: Please take notice that upon the summons and complaint, and the affidavits, order, notices and other papers thereto annexed, and upon the petition and other proceedings hitherto had herein, we shall move this court at a term thereof for the hearing of motions to be held at the Post-Office building, in New York city, Manhattan, on the 11th day of September, 1901, at 10.30 o'clock a. m., or as soon thereafter as counsel can be heard, for an order remanding the above-entitled action to the court from which it was removed, viz: the supreme court of the State of New York for New York county.

Yours &c.,
MACFARLAND, TAYLOR & COSTELLO,
Attorneys for Plaintiffs, No. 63 Wall Street, New York City.

To Messrs. Agar, Ely & Fulton, 31 Nassau St., New York city.

2 Dated New York, September 9th, 1901.

Adjourned by consent to Oct. 7, 1901. Open court.

United States Circuit Court, Southern District of New York.

DANFORTH GEER ET AL., Pl'ffs,
ag'st
THE MATHIESON ALKALI WORKS ET AL., Def'ts.
} Affidavit of Service.

STATE OF NEW YORK,
County of New York, } ss:

Joseph A. Havlicek, of the city of New York, being duly sworn, says that he is above the age of fourteen years and that on the 9th day of September, in the year one thousand nine hundred and one he served the annexed notice on Messrs. Agar, Ely & Fulton, the attorneys for the defendants in this action, at 31 Nassau street, New

York city, by delivering a copy of the same to, and leaving the same with a clerk having charge of their office.

JOSEPH A. HAVLICEK.

Sworn to before me, this 9th day of September, 1901.

KATHERINE J. WORTENDYKE,
Notary Public, New York Co., No. 167.

(Endorsed:) United States circuit court, southern district
3 of New York.—Danforth Geer, *et al.*, plaintiffs, *vs.* The Mathieson Alkali Works, *et al.* defendants.—Notice.—MacFarland, Taylor & Costello, attorneys for plaintiffs, 63 Wall St., New York city.

4 Supreme Court, New York County.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. Smith, Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants. } Summons.

To the above-named defendant-:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated the 17th day of May, 1901.

MACFARLAND, TAYLOR & COSTELLO,
Plaintiffs' Attorneys.

Office and post-office address, No. 63–65 Wall street, New York city (Manhattan).

5 Supreme Court, New York County.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

The plaintiffs complain of the defendants and allege

I. The plaintiffs bring this action as well on their own behalf as on behalf of all others in like situation who may come in and contribute to the expense thereof.

II. The plaintiffs are stockholders of the said Mathieson Alkali Works, and were such stockholders at the date of the conveying away of the property of the said Mathieson Alkali Works, by the defendants, directors of said company, hereinafter mentioned; the plaintiffs' holdings of stock being respectively as follows:

The said Danforth Geer fifty (50) shares.

The said Willard F. Gay, fifty (50) shares.

The said Arthur W. Smith twenty-five (25) shares, Thomas T. Mathieson, thirty-six (36) shares, Robert Morris two hundred
6 (200) shares, Annie Morris twenty-five (25) shares, W. E. S. Clarke, twenty-five (25) shares, and the plaintiff, James D. Thorburn, one hundred and seventy-five (175) shares.

The said Danforth Geer and Willard F. Gay are citizens of the State of New York, residing at Hoosick Falls, in said State, the said Arthur W. Smith is a resident of the State of New Jersey, the several other defendants are citizens of the United Kingdom of Great Britain and Ireland, residing at Liverpool, England.

III. The said Mathieson Alkali Works was created and organized under the laws of the State of Virginia, in or about the month of August, 1892, for the purposes expressed in the petition of incorporation as follows:

"2nd. That the purposes for which the said company is formed are the manufacturing of salt, soda-ash, bleaching powder, sulphuric acid, and chemicals of all kinds, the smelting of iron, zinc, copper and other minerals, the carrying on of a general merchandise business and engaging in the business of agriculture and stock-raising."

The capital stock of the said corporation was to be not less than two (2) nor more than five (5) million dollars; there were to be nine directors. The said corporation has an office and place of business in the city, county and State of New York, and the property to recover which this action is brought is situate in the State of New York.

IV. The defendant The Castner Electrolytic Alkali Company is

also a corporation of the State of Virginia, and has an office and place of business in the said city of New York, where all but two of its directors reside. The said corporation is hereinafter more particularly described.

7 V. The chief promoters of the said corporation the Mathieson Alkali Works were the defendants R. T. Wilson and Edward E. Arnold, as the plaintiffs are informed and believe. The plaintiffs are also informed and believe that the object of the defendant Wilson in the premises was the profitable sale and disposition to such corporation of several thousand acres of land in the State of Virginia, which he owned and alleged to be favorable to the production of the commodities above mentioned, and that the object of the defendant Arnold was to obtain the exclusive sale and disposition of the company's products. That accordingly, after the organization of the said last-mentioned corporation, the said defendant Wilson arranged a sale of the said lands to the company for a large sum payable wholly or in part in mortgage bonds and shares of the company, but as to the details of the said sale the plaintiffs have no knowledge.

VI. The plaintiffs are informed and believe that the said corporation did issue two million of capital stock, and that it also created and issued mortgage bonds but as to the particulars concerning such capital stock and mortgage bonds the plaintiffs have no knowledge, nor for the reasons hereinafter stated, any means of knowledge.

VII. The said Mathieson Alkali Works, after organization, proceeded to erect a manufacturing plant for the purposes of its business at Saltville, in the State of Virginia. When completed, it was put in operation, and has since been maintained.

8 VIII. In or about the month of June, 1896, the said Mathieson Alkali Works entered into a contract with the Niagara Falls Power Company of this State, whereby, among other things, the said alkali company leased lands and power for a plant at Niagara Falls, as hereinafter more particularly set forth; and the said alkali company established on the said premises at Niagara Falls an extensive and valuable plant for the manufacture of commodities mentioned in the charter, and at such plant carried on a profitable business amounting, as the plaintiffs are informed and believe, to several hundred thousand dollars a year, but the plaintiffs are ignorant of the exact facts in relation thereto for reasons hereinafter stated.

The plaintiffs are informed and believe that the defendant Edward E. Arnold is president of the said Mathieson Alkali Works Company, and the defendant R. T. Wilson is its financial agent and manager. The plaintiffs allege on information and belief, that the defendants Arnold and Wilson all along have had, and now have the sole and absolute control of all the affairs of the said company; that the defendants Agar and Ely are attorneys of the said Arnold and Wilson; that the defendant Gladding is an employee of some sort, and that all the directors of the company, other than Arnold and Wilson are what are known and called in such cases dummies, without any substantial interest in the company.

IX. The defendants Arnold and Wilson, so as aforesaid, having the sole control of the affairs of the said company, have managed
9 its business from the beginning with the greatest secrecy and concealment. The plaintiffs are informed and believe that when it has been necessary to call a meeting of stockholders notices have been so arranged that stockholders could not attend and that if any stockholders did attend and exhibit any desire for information concerning the company's affairs, the meeting would be at once adjourned to escape such inquiry, of which course of conduct the following is an instance: The plaintiffs are informed and believe that capital stock of the company to the amount of several hundred thousand dollars is held in Europe, mainly in England, and of that stock the plaintiff Smith represents many holders of shares under proxies and power of attorney.

In 1900 under date of May 29, 1890, the said Arnold, as president, and Gladding as secretary, issued a call for a meeting of stockholders to be held at Saltville, on June 19 following. Those defendants knew that even if at once sent out notices would not be received by European stockholders in time to enable them to be represented at that meeting. But the plaintiff Smith, at the request of those for whom he held proxies, did attend for the purpose of obtaining information concerning the affairs of the company. Having so stated, thereupon the meeting was at once adjourned, and the officials present refused any information whatever, saying that the plaintiff Smith would be advised of any future meeting. The plaintiff Smith has never been informed of any subsequent meeting of stockholders, or of any notice of such meeting.

10 The plaintiffs are informed and believe that the executive business of the said Mathieson Alkali Works Company is mainly carried on in the city of New York. The largest and most profitable part of the business of the company is (or was until lately) carried on at its aforesaid plant and works at Niagara Falls, in the State of New York. A by-law of the company requires that monthly meetings of the directors shall be held in the city of New York.

The plaintiffs are informed and believe that such meetings are held there secretly in respect to time and place of meeting in order to avoid publicity and escape service of legal process.

The plaintiffs are informed and believe that no report has ever been issued to stockholders, giving any account of the business and affairs of the company. The plaintiffs through their representatives, have applied to the officers of the company for leave to examine its books, but such leave was refused. In or about the 9th day of January, 1901, the plaintiff, Smith, applied under the statute made and provided for such cases for an examination of the stock book, which such a company is required to keep and exhibit. The proper officers of the company evaded service, and the person served denied official relation, and so the application was denied by the court for want of proper service. A little later an attempt was made by the plaintiff, Smith, to serve the required demand and notice on the defendant Arnold, as president of the company. He was actually encountered

in the street under some disguise; he denied his identity, and escaped without service—and by reason of this evasion of
11 service of process, the plaintiff has not as yet been able to obtain an inspection of the stock book of the company, which it is by law required to keep and expose to stockholders for inspection as aforesaid.

In violation of the law under which foreign corporations are permitted to carry on business in this State, the said corporation, the Mathieson Alkali Works, so managed and controlled, as aforesaid has not obtained any certificate from the secretary of state authorizing it to carry on business in this State, nor has any one been designated as required by statute on whom service of process can be made.

X. In the summer of 1900, the defendants, Wilson and Arnold promoted and endeavored to carry through a scheme for the transfer of the property, patents and business of the said Mathieson Alkali Works to another corporation of the State of Virginia, and organized by them as the plaintiffs are informed and believe. The said scheme of the defendants Wilson and Arnold, in support of which they issued a prospectus, was disapproved by the stockholders of the Mathieson Alkali Works Company, and it failed. The defendant Wilson, then in effect threatened, as the plaintiffs are informed and believe, that in the event of the failure of this scheme, he would render existing interests in the alkali company worthless.

XI. The defendant Arnold is a member as the plaintiffs are informed and believe, of the firm of Arnold, Hoffman & Com-
12 pany, dealers in chemicals in the city of New York.

The plaintiffs are informed and believe that under contracts and arrangements nominally between the above firm and the said Mathieson Alkali Works, but really between the said firm and the defendant Wilson, the said firm has had the exclusive sale and disposition of the said products of the said alkali works since its organization. The plaintiffs are ignorant of the terms of such contracts and arrangements because they have been concealed and kept secret from stockholders of the company.

The plaintiffs are informed and believe, that such contracts and arrangements are grossly improvident; that they provide, and have provided all along for exorbitant profits and commissions to the said firm, and that the existence of such contracts and arrangements is one reason for the secrecy and concealment as to the company's affairs, and their management above set forth.

The plaintiffs allege that the business, and pecuniary interests of the defendant, Arnold, president of the said alkali company, are actually hostile and prejudicial to the interests of the company and its stockholders.

The plaintiffs are also informed and believe and allege that the pecuniary interests of the said Wilson, as the financial agent of the said alkali company, are also actively hostile to the interests of the said company and its stockholders; and that all the affairs of the company are managed in, and for the personal interests
13 of the said Arnold and Wilson, in opposition to the rights and interests of its stockholders. The said company has

never paid any dividends on its capital stock. The plaintiffs are informed and believe the dividends have been earned and should have been declared and paid, but have in fact, been appropriated by the defendants Arnold and Wilson, by some means or other to their own use respectively.

XII. The plaintiffs are informed and believe and allege, that the defendants Arnold and Wilson, together with the other directors of the said Mathieson Alkali Works have confederated and fraudulently conspired to dispose of, and unlawfully make away with all, or substantially all of the property and assets of the company; and have done so, or attempted to do so by means of the instrument and conveyance hereinafter set forth. That in order the better to conceal their acts and doings in all the premises set forth in this complaint, the defendants, the directors of the said company, which, as aforesaid, is a foreign corporation have as before stated, never designated any person on whom process might be served, as they are required by law to do. And have never obtained from the secretary of state the certificate authorizing the company to enforce contracts made in this State. Moreover, there is a corporation and copartnership directory, published in the city of New York of the said company which should contain the names of the directors of the said company. It is stated in the said directory, that all information was denied. Denied, as the plaintiffs believe, the better to conceal the fraudulent conduct and schemes herein set forth.

14 XIII. The defendants, The Electrolytic Alkali Company purports to be as above stated, a corporation organized under the laws of Virginia. The plaintiffs are informed and believe, that it was promoted and organized by the defendants Arnold and Wilson, or by their procurement; that it is entirely controlled by those two defendants who are chiefly interested in its affairs—but the plaintiffs have but recently and within the last few days, obtained knowledge of the existence of such last-mentioned corporation and of the conveyance hereinafter mentioned; and have no precise knowledge of its origin and affairs—and the plaintiffs believe that the great body of stockholders of the Mathieson Alkali Works Company are yet in ignorance of the existence of said Castner Electrolytic Company, and of the conveyance of the property of the Mathieson Alkali Works Company to the said Castner Electrolytic Company.

By a communication received from the secretary of the State of Virginia, under date of April 30th of the present year, 1901, it appears that the said Castner Electrolytic Alkali Company was incorporated under the laws of the State of Virginia, about July 29, 1900. It is provided by the charter of the said company that its officers shall consist of a president, vice-president and seven directors. In respect to officers for the first year, the certificate of incorporation contains the following provision:

Seventh. The officers for the first year shall be and they are hereby constituted as follows, with the residence of each:

15

Name.	Address.
James M. Edwards, president	New York city, N. Y.
John G. Agar, vice-president	New York city, N. Y.
John H. Ingram, treasurer	New York city, N. Y.
John F. Van Name, secretary	New York city, N. Y.

Directors:

Richard T. Wilson	New York city, N. Y.
Richard T. Wilson, Jr	New York city, N. Y.
James M. Edwards	New York city, N. Y.
Edward E. Arnold	Providence, R. I.
Frank A. Sayles	Saylesville, R. I.
John G. Agar	New York city, N. Y.
John H. Ingram	New York city, N. Y.

The said Richard T. Wilson, is the defendant Wilson. The said Richard T. Wilson, Jr., is his son; the said Edward E. Arnold is the defendant Arnold, and the said John G. Agar is the attorney-at-law of the defendant The Mathieson Alkali Works, and of the other defendants Arnold and Wilson, as the plaintiffs are informed and believe. The plaintiffs are further informed and believe that the other officers and directors of the said electrolytic company are the mere servants and instruments of the said defendants Arnold and Wilson in whose interests the said last-mentioned company was created.

The plaintiffs further allege on information and belief that the said last-mentioned company was created and organized by the said Wilson and Arnold, as a means and contrivance for enabling them to cheat and defraud the creditors and stockholders of the said Mathieson Alkali Works and among other ways by means of

16 the conveyance mentioned below in the next paragraph.

XIV. Within the last few days the plaintiffs have discovered by the records in the office of the county clerk of Erie county, in this State, that on the 31st day of December, 1900, the said Mathieson Alkali Works executed under its corporate seal by the defendant Arnold, its president, and the defendant Gladding, its secretary, the following instrument that is to say:

"The Mathieson Alkali Works
to
Castner Electrolytic Alkali Company. } Assignment.

"Know all men by these presents, that the Mathieson Alkali Works, a corporation created and existing by and under the laws of the State of Virginia, owning patents, applications, rights and property hereinafter described, parties of the first part, for and in consideration of the sum of one dollar and other valuable consideration to it in hand paid by the Castner Electrolytic Alkali Company, also a corporation created, organized and existing by and under the laws of the State of Virginia, party of the second part, receipt whereof is hereby acknowledged, and in consideration of the covenants and

agreements hereinafter contained on the part of said party of the second part, has granted, bargained, sold, assigned, transferred, conveyed and confirmed, and by these presents does hereby grant, bargain, sell, assign, transfer, convey and confirm unto the said party of the second part, its successors and
17 assigns, the following agreements, inventions, rights and property to wit: 1. . certain agreement heretofore made between the party of the first part and the Aluminium Company, Limited, of London, England, bearing date the first day of December 1894, and any and all supplements thereto together with all inventions, patents, rights and privileges acquired by or to which the said Mathieson Alkali Works may be entitled at any time thereunder or by reason thereof subject, however, at all times, to all the conditions, payments, royalties and agreements thereunder to be done, paid or performed on the part of said Mathieson Alkali Works, each and all of which said party of the second part hereby covenants and agrees on its part to assume, pay and perform as part consideration herefor.

2. (*a*.) " United States patent No. 518,135, dated April 10, 1894, granted to Hamilton Young Castner for improvements in connection with electrolytic process, and thereafter duly assigned and transferred to the party of the first part."

(*b*.) " United States patent No. 528,322, dated October 30, 1894, granted to Hamilton Young Castner for new and useful improved processes of, and apparatus for the electrolytic decomposition of alkaline salts, and thereafter duly assigned and transferred to the party of the first part."

(*c*.) " United States patent No. 572,472, dated December 1, 1896, granted to Hamilton Young Castner for new and useful improvements in anodes for electrolytic processes and thereafter duly assigned and transferred to the party of the first part."

18 (*d*.) " United States patent No. 546,348 dated September 17, 1895, granted to William A. Rosenbaum for new and useful improvements in electrolytic apparatus and thereafter duly assigned and transferred to the party of the first part."

" Together with all the right, title and interest of the party of the first part in and to each and every of the foregoing patents and the inventions therein described, and all the rights of every kind of the said party of the first part therein and thereunder subject, however, to all royalties or other payments hereafter due or payable under any agreements affecting any of said patents which royalties and payments the party of the second part hereby assumes and agrees to pay as part consideration herefor."

" The following new and useful improvements and inventions and applications for letters patent for the same to the United States Patent Office and now pending therefor, to wit:

Electrolytic cell, filed March 16, 1900, No. 8968.
Electrolytic cell, filed March 16, 1900, No. 8969.
Pipe coupling, filed March 22, 1900, No. 9681.
Drum heading machine, filed March 22, 1900, No. 9682.
Electrolytic cell, filed March 26, 1900, No. 10220.

Electrolytic cell, filed June 14, 1900, No. 20264.

Rotary pump, filed July 21, 1900, No. 24362.

Gas connector for electrolytic cells, filed October 10, 1900, No. 32623.

Connector for electrolytic cells, filed October 16, 1900, No. 33308.

Design for anodes, filed January 10, 1901, No. 42812.

19 "Together with all right, title and interest — said The Mathieson Alkali Works in said inventions and applications with the right to any and all United States and other letters patent issued or which may be issued thereafter subject, however, to all agreements which the Mathieson Alkali Works may have made in regard to said inventions and applications, which agreements, together with all covenants and payments therein on the part of said The Mathieson Alkali Works, said party of the second part hereby assumes and agrees to perform and pay as part consideration therefor.

"A certain indenture of lease of land and agreement for electrical house power, bearing date the first day of June, 1896, between the Niagara Falls Power Company and the said The Mathieson Alkali Works, together with the supplements thereto, dated the 28th day of June, 1897, and the first day of June, 1898, leasing certain lots, pieces or parcels of land situated in the city of Niagara Falls, county of Niagara and State of New York, as in said lease and supplements more particularly described, together with all the right, title and interest of every kind or description of said Mathieson Alkali Works, to and under said lease and supplements thereto, and in and to all buildings and other fixed property erected on said premises by said Mathieson Alkali Works and belonging to it."

"To have and to hold the same unto the said Castner Electrolytic Alkali Company, its successors and assigns, for and during

20 all the rest, residue and remainder of the terms of said lease and agreements supplementary thereto, and any extensions or renewals thereof, subject nevertheless to the rents, covenants, conditions and provisions in said lease and supplements thereto contained, to be paid and performed on the part of said Mathieson Alkali Works, which, and each of which, said Castner Company hereby assumes and agrees on its part to pay and perform."

"All the buildings, apparatus, plant, stock in trade, trade-marks and property of every kind and description of said The Mathieson Alkali Works, at Niagara Falls in the State of New York; together with the good will of the business heretofore conducted by it at said Niagara Falls."

"To have and to hold the same unto the said party of the second part, its successors and assigns forever. It being the intent of this instrument to grant and convey to the parties of the second part all the plant, rights and property of every kind and description of the Mathieson Alkali Works at Niagara Falls in the State of New York, together with all inventions, patents and patent rights owned and used by it, or in connection with its said works together with all trade-marks and the good will of the business as a going concern

free of all encumbrances except as to the continuing rents, royalties or charges under any existing leases, or agreements."

"And the said party of the first part hereby covenants and agrees that the aforesaid property, rights, patents and inventions are free and clear of and from all former or other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assess-
21 ments, unpaid royalties, liens, mortgages and encumbrances whatsoever, except as hereinbefore specified."

"And the party of the first part for itself and its successors, covenants and agrees to, and with the party of the second part, to warrant and defend the above-described property, rights, patents and inventions, granted, bargained, sold, assigned, transferred, conveyed and confirmed unto the party of the second part, its successors and assigns against all and every person and persons whomsoever."

"And said The Mathieson Alkali Works party of the first part, hereby covenants that it will make, execute, acknowledge and deliver such other and further conveyances and instruments in writing as may be necessary or as counsel may advise, for the further assurance to the party of the second part of the title to the said agreement, inventions, rights and property."

"In witness whereof, the said parties hereto have caused these presents to be signed in their respective names by their respective presidents or vice-presidents and their respective corporate seals to be hereto attached and attested by their respective secretaries, on the 31st day of December, one thousand nine hundred.

[Corporate Seal.]

THE MATHIESON ALKALI WORKS,

(U. S. rev. stamp, $1 canceled.)

By EDWARD E. ARNOLD, *President.*
JOHN RUSSELL GLADDING, *Sec'y.*

[Corporate Seal.]

THE CASTNER ELECTROLYTIC ALKALI COMPANY,
By JOHN G. AGAR, *Vice-President.*
J. F. VAN NAME, *Secretary.*"

22 STATE OF RHODE ISLAND, }
County of Providence. }

"On this 24th day of January, in the year 1901, before me personally came Edward E. Arnold, to me known, who, being by me duly sworn, did depose and say: That he resided in Providence, Rhode Island; that he was the president of the Mathieson Alkali Works, one of the corporations described in and which executed the above and foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of direct-

ors of said corporation and that he signed his name thereto by like order."

GEO. H. BUSIEL,
Notary Public.

[SEAL.]

(U. S. rev. stamp $.10 cancelled.)

UNITED STATES OF AMERICA,
State of Rhode Island and Providence Plantations. } ss:

SECRETARY OF STATE'S OFFICE,
PROVIDENCE, *Jan. 25th*, 1901.

"I hereby certify that George H. Busiel Esquire, whose name is subscribed to the certificate of proof or acknowledgement of the annexed instrument was at the time of taking such proof or acknowledgment a notary public in, and for the State of Rhode Island, and as such authorized by law to take depositions and the acknowledgme*b*t of deeds, and other instruments and to administer oaths; that he was duly commissioned as appears of record and engaged — that I am well acquainted with his handwriting,
23 and I furthermore believe that his signature to the said certificate of proof or acknowledgement is genuine.

"In testimony whereof, I have hereunto set my hand and affixed the seal of the State, the day and year above written.

[SEAL.] CHARLES P. BENNET,
Secretary of State."

U. S. rev. stamp $.10 cancelled.

"STATE OF NEW YORK,
City and County of New York, } ss:

"On this 25th day of January in the year 1901, before me personally came John G. Agar to me known and who being by me duly sworn did depose and say: That he resided in the city of New Rochelle, N. Y., that he was the vice-president of the Castner Electrolytic Alkali Company one of the corporations described in and which executed the above and foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order."

[SEAL.] EDWARD A. FRESHMAN,
Notary Public, New York County.

(U. S. rev. stamp $.10 cancelled.)

"STATE OF NEW YORK,
County of New York, } ss:

"I, William Sohmer, clerk of the county of New York also
24 clerk of the supreme court for the said county, the same being a court of record, do hereby certify that Edward A. Freshman, whose name is subscribed to the certificate of the proof —

acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgement a notary public in and for the county of New York, dwelling in the said county, commissioned and sworn and duly authorized to take the same.

"And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

"In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 14th day of February, 1901.

[SEAL.] WM. SOHMER, *Clerk.*

(U. S. rev. stamp $.10 cancelled.)

Recorded February 15, 1901, at 2 p. m.
SAMUEL H. PETTIT, *Clerk.*"

The plaintiffs are informed and believe that in pursuance of the said conveyance, the property therein described has been delivered and surrendered to the defendant The Castner Electrolytic Alkali Company, and that the said company is now in possession thereof.

XV. The plaintiffs allege on information and belief, that the ownership and use of the patents and other property embraced
25 and described in the above conveyance by the Mathieson Alkali Works is essentially necessary to enable that company to carry on the business for which it was organized; and the above-mentioned conveyance of such patents and property in effect wholly destroys the business of that corporation, renders its capital stock utterly worthless, and deprives the creditors of the corporation, of whom there then were and are, a large number, and for a large amount in the aggregate, of all remedy for the collection of their debts.

XVI. The plaintiffs are advised and charge that the above-mentioned conveyance, in the name of the said Mathieson Alkali Works, is *ultra vires*, fraudulent and void; that the defendant directors, as trustees and agents of and for stockholders, had no power or authority to convey away the plant, property and other patents of the company essential to the carrying on of its business.

The plaintiffs further allege that in view of the fraudulent conveyance, and the misconduct herein specified and charged, the defendants, the directors of the said Alkali Works, are unfit and improper persons to have the charge and management of its affairs, and that a receiver of the said corporation should be appointed, and the defendants be enjoined as hereinafter prayed, and for the reasons above set forth the plaintiffs have not applied to the said defendant The Mathieson Alkali Works to bring this action to set aside the aforesaid conveyance of its property and for other purposes, being advised that the directors of that corporation would not be proper per-
26 sons to bring and prosecute an action in the name of the company, which was practically an action to redress the frauds they themselves had committed.

XVII. As above stated, the plaintiffs have but recently acquired the knowledge of the facts in regard to the said conveyance above set forth, and that such knowledge was obtained in the following manner:

The plaintiffs are informed and believe that the plaintiff, T. T. Mathieson of England, is a creditor of the said Mathieson Alkali Works in the sum of over thirty-three thousand dollars, and the whole of this debt became payable on the first day of February of the present year, 1901. About the 18th of April of the present year Jefferson B. Conley of the said city of New York, as assignee of the said Mathieson, brought an action against the said alkali works for the recovery of the said debt and obtained a writ of attachment. It was in that proceeding that the above-recited conveyance was discovered and the fact communicated to the plaintiffs. The fraudulent concealments of the defendants above set forth have prevented the plaintiffs from obtaining knowledge of the names of all the present stockholders of the said alkali company, and the shortness of time has not permitted the plaintiffs to communicate with such stockholders, as they do know of, but the plaintiffs have good reason to believe that when the facts in the premises become known to them all stockholders not in interest with the defendants will join in this action as plaintiffs.

The plaintiff- *is* advised that a stockholder, having knowledge that the directors of a corporation have made a fraudulent
27 and voidable conveyance of the property of the corporation, must proceed with due diligence to set it aside, or that he will be barred of remedy by implied ratification; the plaintiffs, therefore, bring this suit in anticipation of the coming in of the other stockholders.

The plaintiffs pray: That the conveyance in the name of the said Mathieson Alkali Works, above mentioned, may be adjudged to be fraudulent and void, as to the stockholders of the said company, and that the same may be annulled, vacated and set aside; that a receiver of the said alkali works may be appointed; that the defendant directors of the said corporation may be enjoined from making any further disposition of the property of the company; that the plaintiffs may have, and the said corporation be adjudged and required to make a full disclosure in respect to all the premises herein set forth and alleged; and that to the end of such disclosure the plaintiffs may have access to and inspection of all the books, records and papers of said corporation, including stock book; that the defendant, The Castner Electrolytic Alkali Company, may be required to account in respect to all its acts and doings in the premises hereinbefore set forth, and to make good and pay over all damages sustained by the plaintiffs and by the said Mathieson Alkali Works by reason of such acts and doings and that the said Castner Electrolytic Company may be adjudged and required to reconvey the above-described property and patents so wrongfully conveyed to it in the name of the said Mathieson Alkali Works as aforesaid; and that the said Castner-Electrolytic Company may be adjudged and required

to account for and pay over all the income, earnings, and
28 revenue of the said property since the date of such conveyance; that the individual defendants, directors of the said Mathieson Alkali Works, may be compelled to account as agents and trustees of the said company for all their acts and doings in the premises above set forth; and that they may severally and respectively be adjudged and required to make good and pay to the said Mathieson Alkali Works and to the plaintiffs, all loss and damage caused by their wrongful conduct in the premises as hereinabove set forth; and that the plaintiffs may have such other and further relief as may be just and equitable, together with the costs of this action.

MACFARLAND, TAYLOR & COSTELLO,
Plaintiffs' Attorneys, 63 Wall Street, New York City.

STATE OF NEW YORK, }
County of New York, } *ss:*

Arthur W. Smith, being duly sworn says that he is one of the plaintiffs herein, that he has heard read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believe- it to be true.

ARTHUR W. SMITH.

Sworn to before me this 17th day of May, 1901.
JOHN CUPP LOWE,
Notary Public No. 132, New York County.

29 Endorsed; Supreme court, New York county.—Danforth Geer *et al.*, plaintiffs, *vs.* The Mathieson Alkali Works, *et al.*, defendants.—Summons and complaint. MacFarland, Taylor & Costello, attorneys for plaintiffs 63 Wall street New York city.

30 Know all men by these presents, that we, The Mathieson Alkali Works at Saltville, Virginia, as principal, and Castner Electrolytic Company of Alexandria, Virginia, as principal, and M. Orme Wilson of 414 Fifth avenue, New York city, N. Y., as sureties, are held and firmly bound unto the plaintiffs, Danforth, Geer, Willard F. Gay, Arthur W. Smith, Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke and James D. Thorburn, and to all other persons whom it may concern, in the penal sum of five hundred dollars ($500), to which payment we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents, yet upon these conditions:

The defendant The Mathieson Alkali Works having petitioned to the supreme court of the State of New York in the county of New York, for the removal of a certain cause therein pending, wherein the said Danforth Geer, Willard F. Gay, Arthur W. Smith, Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke and James D. Thorburn are plaintiffs, and said The Mathieson Alkali

Works, The Castner Electrolytic Alkali Company and others are defendants, to the circuit court of the United States for the southern district of New York:

Now, if the said The Mathieson Alkali Works, the petitioner shall enter in the said circuit court of the United States for the southern district of New York, on the first day of its next session a copy of the record in said action, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if
31 said court shall hold that said cause was wrongfully and improperly removed thereto, and shall do and cause to be done such other and appropriate acts as are required pursuant to the statute of the United States in such case made and provided, then this application to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 9th day of August 1901.

THE MATHIESON ALKALI WORKS,
[SEAL.] By EDWARD E. ARNOLD, *President.*
CASTNER ELECTROLYTIC ALKALI COMPANY,
[SEAL.] By JAS. M. EDWARDS, *President.*
M. ORME WILSON. [SEAL.]

STATE OF RHODE ISLAND, *County of Providence,* } *ss:*

On this 12th day of August in the year 1901, before me personally came Edward E. Arnold to me known, who being by me duly sworn did depose and say that he resided in Coventry in the county of Kent and State of Rhode Island, that he is the president of the Mathieson Alkali Works, one of the corporations described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

NATHANIEL W. SMITH,
[SEAL.] *Notary Public.*

32 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, *Providence,* } *sc:*

Office of the clerk of the appellate division of the supreme court in Providence.

PROVIDENCE, *August* 12, *A. D.* 1901.

[SEAL.] I, Betram S. Blaisdell, clerk of the appellate division of the supreme court of said State, in Providence, in the county of Providence the same being a court of record, do hereby certify, that Nathaniel W. Smith, Esq., is a notary public in and for said State, and as such was, at the time of signing said certificate

to the annexed instrument, duly appointed and qualified, and authorized to administer oaths and take depositions and the proof or acknowledgment of deeds and other instruments; that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the said certificate, purporting to be his is genuine.

In attestation whereof, I hereto subscribe my name and affix the seal of said appellate division of said court, the day and year above written.

BETRAM S. BLAISDELL, *Clerk.*

STATE OF NEW YORK, }
County of New York, } *ss:*

On this 9th day of August, in the year 1901 before me personally came James M. Edwards, to me known, who being by me duly sworn did depose and say that he resided in the city of Memphis, Tennessee; that he was the president of the Castner Electrolytic Alkali Company one of the corporations described in and which executed the foregoing instrument; that he knew the seal of
33 said corporation; that the seal affixed to the said instrument was said corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

[SEAL.]

NORMAN L. ZENO,
Notary Public, Kings Co., N. Y.

Certificate filed in New York Co.

STATE OF NEW YORK, }
County of New York, } *ss:*

On this 9th day of August, 1901, before me personally came M. Orme Wilson, to me known and known to me to be one of the persons named in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

[SEAL.]

NORMAN L. ZENO,
Notary Public, Kings Co., N. Y.

Certificate filed in New York Co.

STATE OF NEW YORK, }
County of New York, } *ss:*

M. Orme Wilson being duly sworn says; that he is the surety above named; that he resides at No. 414 Fifth avenue, New York city, and is a freeholder in the State of New York and worth the sum of one thousand dollars ($1000) over and above all the debts or liabilities which he owes or has incurred and exclusive of property exempt by law from levy or sale under execution.

34

M. ORME WILSON.

Sworn to before me this 9th day of August, 1901.
[SEAL.] NORMAL L. ZENO,
Notary Public, Kings Co., N. Y.

Certificate filed in New York Co.

STATE OF NEW YORK, } ss:
County of New York, }

I, William Sohmer, clerk of the said county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original record on removal to U. S. court Danforth Geer, *et al. vs.* The Mathieson Alkali Works, *et al.*, on file in my office and that the same are a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 16th day of August, 1901.
[SEAL.] WM. SOHMER, *Clerk.*

Endorsed: Supreme court, New York county.—Danforth Geer and others against The Mathieson Alkali Works, Castner Electrolytic Alkali Company and others. Bond upon removal.—Agar, Ely & Fulton, attorneys for petitioners appearing specially only. 31 Nassau street, New York city.—The within bond is hereby approved as to form and sufficiency N. Y. Aug. 14, 1901. J. A. Gorman, J. S. C. Justice of the supreme court of the State of New York, Filed Aug. 15, 1901.—

Further endorsed: United States circuit court, southern district of New York.—Danforth Geer and others, plaintiffs, *vs.* The Mathieson Alkali Works, Castner Electrolytic Alkali Company and others, defendants. Record on removal from New York supreme court. Agar, Ely & Fulton, attorneys for petitioners, appearing specially only, 31 Nassau St., N. Y.—U. S. circuit court Filed Oct. 21, 1901, John A. Shields, clerk.

35 Supreme Court, New York County.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,
against
THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants. } Petition.

To the supreme court of the State of New York:

The petition of the Mathieson Alkali Works and the Castner Electrolytic Alkali Company, appearing herein specially only for

the sole and single purpose of presenting this petition to this honorable court for the removal of the above-entitled cause to the circuit court of the United States for the southern district of New York, respectfully shows to this court:

I. That your petitioners are two corporations defendants above named and that the time in which they and all the other defendants are severally required by the laws of the State of New York to answer or to plead to the complaint herein has not yet expired.

II. That this action is of a civil nature in equity and that the matter in dispute exceeds, exclusive of interest and costs the sum or value of $2,000.

36 III. That the controversy in this action so far as your petitioners are defendants or are interested in such controversy, is wholly between citizens of different States, as appears from the complaint copy of which is filed herewith as part hereof.

IV. That the plaintiffs, Danforth Geer and Willard F. Gay, are citizens of the State of New York, that plaintiff Arthur W. Smith is a resident of the State of New Jersey; the plaintiffs Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke and James D. Thorburn are residents and citizens of the Kingdom of Great Britain.

V. That the petitioner The Mathieson Alkali Works was at the commencement of this action and always has been and still is a corporation duly organized and existing by virtue of the laws of the State of Virginia and a citizen of said State. That the petitioner The Castner Electrolytic Alkali Company was at the commencement of this action, always has been and still is a corporation duly organized and existing under and by virtue of the laws of the State of Virginia, and a citizen of said State of Virginia.

VI. That in this action the only controversy affecting your petitioners or in which your petitioners are actually interested, is between the said plaintiffs on one side and your petitioners The Mathieson Alkali Works and The Castner Electrolytic Alkali Company on the other, and that said controversy is wholly between citizens of different States and can be fully determined as between them and is separable from the controversy which the plaintiffs

37 have or pretend to have as against the other defendants.

VII. Your petitioners further show that the defendants Richard T. Wilson, John G. Agar and Alfred Ely are residents and citizens of the State of New York; the defendants Frederick C. Sayles, Frank A. Sayles, Edward E. Arnold and John R. Gladding are residents and citizens of the State of Rhode Island, and the defendant Theodore Hooper is a resident and citizen of the State of Maryland, and that the said defendants are fraudently and improperly joined by the plaintiffs as parties defendant for purposes entirely foreign to the controversy with your petitioners.

VIII. Your petitioners offer herewith a bond with good and sufficient surety for its entering in the circuit court of the United States for the southern district of New York, on or before the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court

shall hold that such action was wrongfully and improperly removed thereto.

IX. And your petitioners pray this honorable court to proceed no further herein as against your petitioners, the defendants The Mathieson Alkali Works and the Castner Electrolytic Alkali Company, except to make an order of removal as to them as required by law, and to accept said bond and to cause the record herein to be removed to the said circuit court of the United States in and for the southern district of New York.

And your petitioners will ever pray.

38 Dated August 9th, 1901.

THE MATHIESON ALKALI WORKS,
[SEAL.] By EDWARD E. ARNOLD, *President.*
THE CASTNER ELECTROLYTIC ALKALI CO.,
[SEAL.] By JAS. M. EDWARDS, *President.*

STATE OF NEW YORK, } ss:
County of New York, }

James M. Edwards, being duly sworn, says: that he is the president and as such the chief executive officer of The Castner Electrolytic Alkali Company, one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAS. M. EDWARDS.

Sworn to before me this 9th day of August, 1901.

NORMAN L. ZENO,
[SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in N. Y. Co.

Endorsed: Supreme court, New York county.—Danforth Geer and others, against The Mathieson Alkali Works, Castner Electrolytic Alkali Company and others.—Petition for removal of cause. Agar, Ely & Fulton, attorneys for petitioners, appearing specially only, 31 Nassau streey, borough of Manhattan, New York city.

39 U. S. Circuit Court, Southern District of New York.

DANFORTH GEER ET AL.
vs.
THE MATHIESON ALKALI WORKS.

Motion to Remand.

LACOMBE, *Circuit Judge:*

Whatever relief the complainants may be entitled to against the directors upon the facts alleged, they would as to the two corporations be entitled to a decree for retransfer of the property and an

accounting for damages sustained by the transfer. This is a controversy separable from the one between complainants and the officers and directors who effected the transfer, and citizenship of the parties to that separable controversy being such as the statute contemplates the motion to remand is denied.

(Endorsed:) Circuit court of the United States for the southern district of New York.—Geer *vs.* Mathieson Alkali Works.—Opinion, Lacombe, J.—U. S. circuit court. Filed Oct. 14, 1901, John A. Shields, clerk.

40 At a stated term of the United States circuit court for the southern district of New York, held at the United States court-house in the city of New York, in said district, on the 24th day of October, 1901.

Present: Hon. E. Henry Lacombe, circuit judge.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

This cause having been removed upon the petition of the defendants The Mathieson Alkali Works and Castner Electrolytic Alkali Company, corporations of the State of Virginia, from the supreme court of the State of New York, county of New York, and a motion having been made by the plaintiffs to remand this cause to the New York supreme court, and said motion having come on duly for hearing at a stated term of this court on the 7th day of October, 1901:

Now after hearing W. W. MacFarland, Esq., of counsel for plaintiffs in support of said motion, and Alfred Ely, Esq., of counsel for defendants, The Mathieson Alkali Works and Castner Electrolytic Alkali Company, in opposition thereto, and upon reading and

41 filing the plaintiffs' notice of motion and upon the certified copy of the record herein, filed in this court upon the removal of this cause, and the matter having been duly considered:

Ordered, that the plaintiffs' motion to remand this cause to the supreme court of the State of New York, for the county of New York, from which said cause was removed to this court, be, and the same hereby is, in all respects denied.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) United States circuit court, southern district of New York.—Danforth Geer, *et al.*, plaintiffs, against The Mathieson Alkali Works, *et al.*, defendants.—Order denying motion to remand. Agar, Ely & Fulton, appearing specially for the defendants The Mathieson Alkali Works and The Castner Electrolytic Alkali Company, 31 Nassau St. New York city.—U. S. circuit court. Filed Oct. 24, 1901, John A. Shields, clerk.

42 United States Circuit Court, Southern District of New York.

DANFORTH GEER ET AL., Plaintiffs,
against
THE MATHIESON ALKALI WORKS, CASTNER Electrolytic Alkali Company, *et al.*, Respondents. } Order to Show Cause.

On reading the annexed affidavit of Alfred Ely, attorney and counsellor at law, and one of the attorneys appearing specially herein on behalf of the defendant The Mathieson Alkali Works, for the sole purpose of applying to this court for an order setting aside the summons in this action, and the service thereof on said defendant, alleged to have been made as specified in the affidavit hereto annexed, and on the said summons and complaint and petition for removal, and upon the proceedings and record filed, it is

Ordered, that the plaintiffs, or their attorneys, show cause before this court at the United States court-house in the borough of Manhattan, New York city, on the 1st day of November, 1901, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the said summons and service thereof on said defendant The Mathieson Alkali Works should not be set aside and declared to be null and void, and why said defendant should not have such other and further relief as may be just; that said defendant have leave to file further affidavits in support of this
43 motion upon the hearing thereof, copies thereof to be served upon the plaintiff's attorneys at least ten days in advance of such hearing; and that in the meantime all proceedings herein by plaintiffs be, and the same hereby are, stayed.

Further ordered that the time of the defendant The Mathieson Alkali Works, and also of defendant Castner Electrolytic Alkali Company, severally to enter general appearances in the above-entitled action in this court, and to answer or demur or plead to the complaint herein, or to make such motion, or to take such other action with respect thereto as they may be advised, be, and the same hereby is, extended until twenty days after the entry and service upon the opposite party of such order as may be made by the court upon the hearing and determining of this application to set aside the summons in this action and the service thereof upon the defendant The Mathieson Alkali Works, as aforesaid.

Further ordered that service of a copy of this order to show cause

on plaintiffs or their attorneys, on or before the 26th day of October, 1901, shall be deemed sufficient service thereof.

October 24, 1901.

E. HENRY LACOMBE, *U. S. C. J.*

44 United States Circuit Court, Southern District of New York.

DANFORTH GEER and Others, Plaintiffs,
against
THE MATHIESON ALKALI WORKS, CASTNER ELECTROLYTIC ALkali Company, and Others, Respondents.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Alfred Ely, being duly sworn, says: I am an attorney and counsellor at law of the supreme court of the State of New York, also duly admitted to practice in this court, and am one of the law firm of Agar, Ely & Fulton, retained by the defendants The Mathieson Alkali Works, and also Castner Electrolytic Alkali Company in the above-entitled action. I am and for more than five years last past have been one of the attorneys and general counsel for the defendant The Mathieson Alkali Works, and also one of its directors, and am familiar with the affairs of said defendant corporation. On August 1, 1901, a copy of certain papers addressed to The Mathieson Alkali Works, purporting to be a summons and complaint, entitled in an action in the supreme court *in* the State of New York, county of New York, wherein the above-named Danforth Geer and others were named as plaintiffs and The Mathieson Alkali Works, a corporation of the State of Virginia was named, among others, as
45 a defendant, was handed to me at my law office No. 31 Nassau street, New York city; at that time I was not an officer of said defendant The Mathieson Alkali Works, and never had been. Nevertheless the delivery of such papers to me is claimed by the plaintiff- to have been service of the summons and complaint upon the defendant The Mathieson Alkali Works.

The Mathieson Alkali Works named as defendant in said action, is a corporation of the State of Virginia and has for more than eight years been continuously engaged in the manufacture of alkali, salt and heavy chemicals at Saltville, Virginia, where it has, and has had continuously its works, plant, principal office and place of business, said corporation was not on said August 1, 1901 and is not now, engaged in business in the State of New York. On said August 1, 1901, and for more than six months prior thereto, it had no place of business within the State of New York, no property within the State of New York, no office within the State of New York, nor any agent resident in the State of New York. The main office and place of business of said defendant corporation is and always has been at Saltville, Va. Its only other office and place of transacting business is and always has been at Providence, in the State of Rhode Island, where on said August 1, 1901, its president,

secretary and treasurer and executive officers, outside of the State of Virginia, resided and transacted its business, and had so resided and transacted business continuously for many years.

For about two or three years prior to December 31, 1900, the defendant had a manufacturing plant at Niagara Falls in the
46 State of New York, where it was engaged in manufacturing caustic soda and bleach by certain electrical processes and in connection with this plant and prior to December 31, 1900, it had a works and office at Niagara Falls for the purpose of attending to the details connected with the manufacturing operations there conducted. There was not at any time an office of the company for the general transaction of its business at Niagara Falls. This plant and all property of said Mathieson Alkali Works of every kind within the State of New York, was, about December 31, 1900, sold by it for full value, and delivered to the Castner Electrolytic Alkali Company and thereupon the defendant Mathieson Alkali Works retired absolutely and wholly from the State of New York, and since that time has had no property or office, has not transacted business and has not been within the State of New York. This sale and transfer was under negotiation for a period of several months prior to its consummation, was authorized by the unanimous vote of all the stockholders present at a meeting duly called for the purpose, at which more than three-fourths of the entire capital stock of the company was present and voting, and was finally concluded about December 31, 1900 as aforesaid, and the actual delivery had within a few days thereafter.

On August 15, 1901, said defendant The Mathieson Alkali Works, appeared specially by its said attorneys for the sole and single purpose of having the above-entitled cause removed to the United States circuit court for the southern district of New York, under the provisions of the act of Congress in such case made and
47 provided, and duly presented and filed its petition to said supreme court of the State of New York, in the county of New York, for the purpose of such removal, with the requisite bond, with sufficient surety, which was duly approved by a justice of the New York supreme court, and thereupon said cause was removed into this United States circuit court for the southern district of New York, all of which will more fully appear by reference to said petition, and also to the certified copy of the record in said action duly filed in the office of the clerk of this court on October 21, 1901, and hereby referred to as part hereof.

Said Alkali Works has now entered its special appearance also in this court, by its said attorneys, for the sole purpose of applying to this court for an order setting aside said summons and the alleged service thereof claimed to have been made as aforesaid upon said defendant Mathieson Alkali Works by the delivery of said summons to me, on the ground that said service is under the laws of the United States and the decisions of the Federal courts of no force or effect as against said defendant corporation The Mathieson Alkali Works, and is utterly void and gave no jurisdiction over said defendants.

To this end an order to show cause is desired on behalf of said defendant corporation, now appearing specially for such purpose only, directing the plaintiffs or their attorneys to show cause before this court why the summons in this action and the service thereof so alleged to have been made on said defendant, The Mathieson Alkali Works, should not be set aside as wholly illegal and void and of no effect.

48 In behalf of the Mathieson Alkali Works it is also desired that the time of said defendant and also of the Castner Electrolytic Alkali Company to enter general appearances in this action and to take any other proceedings herein by way of pleas or motions in this court, with respect to the complaint or otherwise, be extended in the meantime as to the court may seem just.

A certified copy of the record in this action upon its removal, as aforesaid, was duly filed in this court on October 21, 1901, that being the day appointed by the rules of this court for so filing, and this application to set aside the summons is now made immediately thereafter. Furthermore the time of said defendant The Mathieson Alkali Works to plead or move will expire on October 26, 1901, and of the Castner Electrolytic Alkali Company on October 28, 1901, before any motion now made can be heard or determined. For this reason also an order to show cause is desired. No extension of time to plead or move in behalf of said two defendants has been heretofore had and no other application for the relief now asked has been made at any time.

Shortly after the filing of the petition by said defendants The Mathieson Alkali Works and Castner Electrolytic Alkali Company in the New York supreme court for the removal of this cause to this court, a motion to remand was made by plaintiffs which was only decided by the court within the past few days, denying the same. The order upon such decision has not yet been made. Because also of this motion and pending its decision this application in behalf of the Mathieson Alkali Works was not heretofore made.

49 I further say that when the pretended service of the summons herein on the Mathieson Alkali Works was made on me on August 1, 1901, as aforesaid, Edward E. Arnold was the president and chief executive officer of said defendant and John R. Gladding its secretary and treasurer, and that both of them resided and had, and have still, their offices for the transaction of all the business of said corporation at the city of Providence, Rhode Island, where they were and are now in regularly daily attendance for the purpose. For this reason I have been unable in the short time at my disposal since the denial of plaintiffs' motion to remand and the filing of the record herein to obtain affidavits for the purpose of this motion from said Arnold and Gladding in advance of the application for the order to show cause now sought. Leave is therefore asked to file additional affidavits in behalf of the Mathieson Alkali Works upon this motion within such time before the hearing as the court may deem best.

ALFRED ELY.

Subscribed and sworn to before me this 24th day of October, 1901.
EDWARD A. FRESHMAN,
[SEAL.] *Notary Public, New York County.*

Endorsed: Memo. Endorsed, Lacombe J. Motion granted and attempted service on Mathieson Alkali Works is set aside. Nov. 29, 1901. E. H. Lacombe, U. S. C. J. United States circuit court, southern district of New York.—Danforth Geer, *et al.*, plaintiffs, against The Mathieson Alkali Works, defendants. Order to show cause and affidavits.—Agar, Ely & Fulton, appearing specially for the Mathieson Alkali Works and the Castner Electrolytic
50 Alkali Company, 31 Nassau street, New York city.—Service of a copy of the within admitted this 25th day of Oct. 1901. Macfarland, Taylor & Costello, att'ys for pl'ffs.—U. S. circuit court, Filed Nov. 29, 1901, southern district of New York, John A. Shields, clerk.

51 United States Circuit Court, Southern District of New York.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James B. Thorburn, Plaintiffs,
against
THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, and Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Willard U. Taylor, being duly sworn, deposes and says:

I am one of the attorneys and solicitors in the above-entitled action. The action was commenced in the supreme court of the State of New York by a summons served on Alfred Ely, a resident director of the defendant, The Mathieson Alkali Works, on the 1st day of August, 1901. Such service was made by William F. Grell, sheriff, of the county of New York, under and in pursuance of section 432 of the Code of Civil Procedure; and it was made upon the said Ely, as a director, because of the absence of any of the other persons mentioned in the said section upon whom service might be made, as appears by the return of the sheriff, a copy of which is hereunto annexed.

52 The summons was served upon the Castner Electrolytic Alkali Company, August 2nd, 1901 by serving the summons upon James M. Edwards, the president of that company at his office in the city of New York.

About six days before the expiration of the time to answer, these defendant corporations filed a petition in the State court for a re-

moval of the cause to this court on the ground that, as to them the action embraced a separate controversy.

The cause was removed on August the 14th, 1901, but the record was not entered in this court by the defendants until the 21st day of October, 1901, and after a notice to remand had compelled such filing.

Notice of motion to remand was served September the 9th, 1901; it came on to be heard on the 7th day of October, 1901, and was denied.

Answers were due from both of these defendants on the September rule day; at the latest by the October rule day. No answers were filed, and the defendants were in default. They were reminded of their default by a letter from my firm October 22nd, 1901, and they were informed that unless answers were served within ten (10) days, decree *pro confesso* would be entered. Then on the 25th day of October, my firm was served with a notice of this motion made by the Mathieson Company, to set aside the service of process on that company, accompanied by a stay for twenty (20) days after the service of the order that may be entered on the petition, and the stay is in favor of both corporations, although the Castner Alkali Company is not a moving party. The motion is made merely
53 for the purpose of delay, and the affidavit upon which it is based is deceptive. And in this behalf I further say:

First. It is admitted in the affidavit of Ely that he was a resident director of the Mathieson Alkali Works, and the return of the sheriff further shows that fact, and also the absence of any other person on whom service could be made.

Second. It appears that the cause of action arose within this State. The *cause of action* is the fraudulent sale and delivery within this State of the property situated at Niagara Falls in this State; that property the plaintiffs and other stockholders owned, and operated here through their agents, the directors, of these companies. Here it is admitted by this motion, that this property was fraudulently turned over by the Mathieson Alkali Works, to the Castner Alkali Company. And so here I say, the cause of action arose and it is here in this State if anywhere that the fraudulent disposition of this property situated here must be set aside, and the rights of the plaintiffs enforced.

There is nothing in the affidavit in denial of the above statement. It is not pretended that the cause of action did not arise here.

Third. As to the pretence that this defendant company has no property in this State, I am advised that this is a separate and independent ground of jurisdiction, and stands by itself; the other ground of jurisdiction, being, as above stated, that the cause of action arose here. But I am further advised, and I say, that, for all the purposes of jurisdiction, the Mathieson Alkali Company,
54 is to be still regarded as the owner of the property in question. In legal intendment, as I am advised, the motion admits the allegations of the complaint, and consequently proceeds on the assumption that the transfer was fraudulent, as it is alleged to be, otherwise, the decision of the motion would depend on the re-

sult of a trial of the action on its merits, and these merits cannot be tried on this motion, but only in the normal way, are issues duly presented. For these reasons, I say that the allegation in the affidavit of the said Ely to the effect that the Mathieson Alkali Company, has no property in this State, is untrue, and moreover frivilous as assuming the very fact in dispute, and as denying the allegations of the complaint, which for the purposes of this motion must be taken to be true.

Fourth. I say it is untrue according to my best information and belief, that the said Mathieson Company has had no office and place of business in New York, since December 31st, 1900, and has wholly retired from the said State. In the first place, this allegation is based on the false assumption that the conveyance of the Niagara plant by the Mathieson Alkali Company is to be taken to be valid, because the said Ely says it is. In the next place at the time the said affidavit of Ely was made James M. Edwards of the city of New York was and for some time before, had been president of the company with his office at No. 33 Wall street, New York city, Manhattan.

I am informed and believe that the said company maintains its organization and offices here; holds meetings of its directors here monthly, as required by its laws; has its financial agency
55 here; also its books and records and conducts all of its executive business here, and that no such office or offices are maintained elsewhere. In this behalf I reaffirm all the allegations of the complaint, and I further say, that as charged in the complaint, the name of the Castner Electrolytic Company is in substance merely an alias for the Mathieson Alkali Company, and that both are managed practically by the same persons, and in the same interest as charged in the complaint. I say that every pretense of the said Ely to the contrary hereof is untrue. But I am advised that these controverted questions of fact are immaterial inasmuch as it is obvious, and not desired that the cause of action set forth in the complaint arose within this State, and that the supreme court had jurisdiction. Nor, is the legal sufficiency of the cause of action denied, and it could not be on this motion.

Fifth. While availing of the comity of the State for the purpose of residence, and the transaction of business here, this defendant has all along, and still does violate and disregard the laws of the State by not appointing an agent here on whom the service of process could be made, and this is done for the purpose of fraudulently avoiding the jurisdiction of the courts of the State.

Sixth. The removal of this cause into this court on the ground of an existing separable controversy, was, as I am advised, a conclusive admission that there was and is a controversy determinable, either in the State court or in this court, and consequently a conclusive admission that the defendants had been properly brought into court, and that it is not open to the defendant now to pretend to the contrary.

56 For these reasons I am advised, that the affidavit of the said Ely is frivolous.

I have charged, and I repeat, that this motion is made merely for the purpose of delay. Further proofs of this may be seen in the records of this court supplemented by the following facts:

The Mathieson Alkali Company was debtor to one of the plaintiffs in this action, Thomas T. Mathieson, in a large sum; for convenience the debt was assigned to Jefferson B. Conley, who commenced an action in the supreme court of the State of New York against the said company to recover the debt (against which there has never been any pretense of defence).

About May the 8th the defendant company removed the action into this court on the ground of diverse citizenship. The company did not file the record in this court, and, therefore, the plaintiff filed it on the 22nd of May, Thereafter the defendant company, obtained an order to show cause why the service of the summons should not be set aside August 16th, 1901; there was an order of reference to Arthur H. Masten. In pursuance of its policy of subterfuge and delay, the defendants failed to serve the order and bring on the reference, this was done by the plaintiff, about the 15th day of August, 1901, on the 16th the referee acknowledged the receipt of the papers, and suggested that, as he was about to leave on his vacation, the reference proceed immediately. The plaintiff was ready and prepared to proceed the defendant was not ready; pretended that a witness was absent, and begged for delay. The matter came on again

57 on the 28th of August, 1901, the defendant, who had obtained the reference, was still not ready, and finally, as the referee was about to leave on his vacation, it was stipulated that the reference should stand adjourned till October 17th, 1901; that the case should be placed on the October calendar, and that an answer should be served within ten (10) days after the decision of the matter. The course of this defendant in that case shows and illustrates the deceptive and fraudulent character of these motions, as mere schemes for evasion and delay. It is suggested in Ely's affidavit, that the remedy of the plaintiffs in both these actions, should be sought in Saltville or Providence. This is distinctly a fraudulent suggestion. The said Ely knows that The Mathieson Alkali Company has not, and never had anything but a nominal relation with either of these places, and that it would be impossible to ever make service upon that defendant in either place, none, especially since the defendant, Arnold, has ceased to be president of the company, and the office of the president has been moved to New York. Saltville, is merely a hamlet, where the company employs workmen to make alkali, no executive office is maintained there; nor does any executive officer of the company reside there, as I am informed.

Arnold, at one time, but no longer president of the defendant company, resided at Providence, and so did Gladding, the secretary; but nothing more than merely clerical work of the secretary, or some part of it was transacted at Providence. As said before, the government and all the executive functions were, and are carried on at the city of New York.

58 The defendant company, and the said Ely know and understand that if the plaintiffs are denied a remedy, either in the State court, or in this court, the plaintiffs are without

remedy at all in the premises, and it is the sole object of this fraudulent and decfp-ive motion to escape liability by thus depriving the plaintiffs of all remedy. I call attention to the fact, that the jurisdiction of the State court is not denied by said Ely; and to the further fact that it is manifest on the face of the complaint that such jurisdiction existed and exists. And I am advised that such being the case the defendant company is estopped from questioning the jurisdiction of the court into which it removed the cause.

The extension of time to answer given by the order is a hardship to which it is submitted the plaintiffs ought not to be subjected, especially, when the character of the motion, as mere *shunage* is palpably plain. As for the Castner Company, not being a party to the motion, it has no color of right to an extension of time. The very fact of its inclusion in this informal manner with the Mathieson Alkali Company, in this proceeding is an admission of that perfect identity of the two corporations alleged above. The plaintiffs are now entitled as of right to take a decree *pro confesso*, and it is submitted that they should be permitted to do so.

Having prepared this so far and wishing to fill in blanks left for the names of the existing president and secretary, of the said Mathieson Alkali Company, I sent by one of my clerks the following note to the defendants' attorneys:

59 "NEW YORK, *October* 28, 1901.

Messrs. Agar, Ely & Fulton, 31 Nassau street, New York city.

DEAR SIRS: Will you kindly send us by the messenger, the names and addresses of the existing president and secretary of the Mathieson Alkali Works.

Very truly yours,
(Signed), MACFARLAND, TAYLOR & COSTELLO."

It was delivered to the said Ely, who made the affidavit in support of this motion; he refused an answer. I state this as another instance of the secretive and fraudulent conduct that has characterized all the proceedings of the defense in this case. I repeat that I am informed and have no doubt that both the president and secretary are residents of, or at least, carry on business and maintain their offices, as such president and secretary in this city of which fact the said Ely's refusal is practically an admission.

WILLARD U. TAYLOR.

Sworn to before me this 29th day of October, 1901.

KATHERINE J. WORTENDYKE,
[SEAL.] *Notary Public, New York Co.*

60 Supreme Court, New York County.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James B. Thorburn, Plaintiffs,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia; and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

CITY AND COUNTY OF NEW YORK, *ss:*

I, William F. Grell, sheriff of the county of New York, do hereby certify that I have made diligent search throughout my county for the president, secretary or treasurer of the above-named defendant, The Mathieson Alkali Works, a foreign corporation of the State of Virginia, and also for an officer performing corresponding functions to the officers above named in order to serve the annexed process and that after such diligent and proper search I have been unable to find any such officer. I have further ascertained by a certificate of the secretary of state that no person has been designated by the said defendant corporation to accept service of process as required by statute and contemplated by section 432 of the Code of Civil Procedure. Thereupon and after such due and diligent enquiry

61 as aforesaid, on August 1st, 1901, at 31 Nassau street, New York city, Manhattan, I served the annexed process upon Alfred Ely, a director of the said corporation residing in this county together with the following notice, to wit:

To —— ——:

Take notice that the annexed summons and process against the Mathieson Alkali Works is served upon you as a director of the said corporation under the provision of section 432 of the Code of Civil Procedure, authorizing the service of process upon a foreign corporation by service upon a director when the other officer or agents of such corporation therein mentioned cannot be found, and such service upon you is intended as and for a service upon the defendant The Mathieson Alkali Works.

Dated August 1, 1901.

(Signed) WILLIAM F. GRELL, *Sheriff.*

(Signed) THOMAS HALLIGAN, *Deputy.*

Endorsed: United States circuit court, southern district of New York.—Danforth Geer, *et al*, plaintiffs, *vs.* The Mathieson Alkali Works, *et al.*, defendants.—Affidavit of W. U. Taylor.—MacFarland, Taylor & Costello, attorneys for plaintiffs, 63 Wall street, New York city.—U. S. circuit court, southern district of New York. Filed Nov. 29, 1901. John A. Shields, clerk.

62 United States Circuit Court, Southern District of New York.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

UNITED STATES OF AMERICA,
State of Rhode Island, County of Providence, } ss:

Edward E. Arnold, being duly sworn, says: That in August, 1901, when the summons in this action was served, and at all the times mentioned in the complaint in this action, he was a resident of the city of Providence, State of Rhode Island, and a citizen of said State, and also the president and chief executive officer of The Mathieson Alkali Works, one of the defendants above named. Said defendant is a corporation of the State of Virginia, duly organized and existing under the laws of said State, where its principal office and place of business is now, and always has been located; where it has now, and has had for many years, large and extensive properties and plants for the manufacture of salt, soda-ash and heavy chem-

63 icals by chemical processes. The defendant has also for some years, and since shortly after its incorporation, had an office for transacting business at the city of Providence, State of Rhode Island, where its president and treasurer were on August 1st, 1901 (when the summons and complaint in this action is claimed to have been served as hereinafter set forth), and had been also, at all the times mentioned in the complaint since about 1894, regularly in daily attendance for the transaction of the business of the corporation and this had been for many years, and was, on August 1st, 1901, and is now, the only office of the company for the transaction of its business other than manufacturing operations, outside of the State of Virginia.

I am informed that on or about the first day of August, 1901, a copy of the summons and complaint in this action was delivered to Mr. Alfred Ely, counsellor-at-law, and for many years one of defendant's general counsel, at his law office No. 31 Nassau street, New York city, and that such delivery to Mr. Ely is claimed by plaintiffs as service of the summons and complaint upon the defendant corporation, and that upon such service only is any jurisdiction of the defendant had or claimed in this action.

Said Alfred Ely, was not, however, on the said first day of August, 1901, or at any time prior thereto, an officer of the defendant corporation. It is true that Mr. Ely was at the time, and had been for

some years a member of the board of directors of said defendant alkali works, but he is not, and has not been at any time, an officer or agent of the said defendant authorized to represent it, or
64 engaged in any way in the conduct or management of its affairs, except as a director.

I further say that on the first day of August, 1901, when said pretended service of summons and complaint was made, said defendant, Mathieson Alkali Works, had no property of any kind whatever within the State of New York, had no agent or office within the State of New York, and was not engaged in any way in business or in transacting business in the State of New York, and was not doing business within the State of New York, and had not been for many months.

For about three years prior to December 31, 1900, the Mathieson alkali works had a manufacturing establishment at Niagara Falls in the State of New York, where it was engaged in manufacturing caustic soda and bleaching powder only, by certain patented electrical processes, which it then owned and there operated. No other business was there transacted, except the strictly manufacturing operations of this plant, in the manufacture of caustic soda and bleach. In connection with this plant, it had, at Niagara Falls, during that time, and prior to December 31, 1900, a works' office for the sole purpose of attending to the details strictly connected with the manufacturing operations there conducted. This was not at any time an office of the company for the general transaction of its business, and was not in charge of any officer or general agent of the company, and was not an office or place at which the defendant transacted any business except that of strictly manufacturing. Its offices and places for transacting its business were, during all this time, and are now, only at Saltville, Virginia, and at Providence, Rhode Island.

About the 31st day of December 1900, the defendant alkali
65 works, for full value, sold and transferred its entire plant at Niagara Falls, and all its property of every kind and description whatever in the State of New York, including its electrical processes, to the Castner Electrolytic Alkali Company, a Virginia corporation, and thereupon said Mathieson Alkali Works retired absolutely and wholly from the State of New York.

This sale was under negotiation for many months prior to its consummation, was duly authorized in advance by the unanimous vote of all the stockholders of the Mathieson Alkali Works present at a special meeting of the stockholders called for the express purpose of considering and acting upon the matter. Due notice in every respect of this meeting was given to every stockholder of the company, and more than three-fourths of the entire capital stock attended and voted unanimously in favor of such sale, which was subsequently made in all respects in accordance with said authorization of the stockholders, and was finally concluded about December 31, 1900. The actual delivery to the Castner Electrolytic Alkali Company was made by the defendant alkali works shortly after the first of January, 1901, having been delayed on account of certain

details. Since then the defendant has had no property or office, and has not done business within the State of New York.

Said sale and transfer of the plant and property at Niagara Falls, with the processes there operated by the Mathieson Alkali Works to the Castner Electrolytic Alkali Company, was not only duly authorized by a unanimous vote as aforesaid, but was in every other respect fully authorized and a fully legal, proper and *bona fide* transaction and one which has proved of great benefit to the
66 Mathieson Alkali Works and to every one of its stockholders, and has since then been duly approved and ratified by them without a dissenting voice.

I have read the plaintiffs' complaint in this action, and state of my own knowledge, that every allegation therein with respect to this sale and transfer, stating or implying directly or indirectly or by inference, that the same was fraudulent or unauthorized or unknown to the stockholders or in any way directly or indirectly to the disadvantages of all the stockholders or creditors of the Mathieson Alkali Works, or to the advantage of any individuals, is absolutely and unqualifiedly false, and either known to some of the plaintiffs at least, if not to all, to be false when made, or not known to any of them to be true. There never was the slightest foundation in fact for any of such allegations in the complaint.

EDWARD E. ARNOLD.

Subscribed and sworn to before me this 29th day of October, 1901.

EDWARD P. JASTRAM,
[SEAL.] *Notary Public.*

67 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, *Providence,* } *sc:*

Office of the clerk of the appellate division of the supreme court in Providence.

PROVIDENCE, *October* 29, *A. D.* 1901.

[SEAL.] I, Bertram S. Blaisdell, clerk of the appellate division of the supreme court of said State, in Providence, in the county of Providence, the same being a court of record, do hereby certify that Edward P. Jastram, Esq., is a notary public in and for said State, and as such was, at the time of signing said certificate to the annexed instrument, duly appointed and qualified, and authorized to administer oaths and take depositions and the proof of acknowledgment of deeds and other instruments; that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the said certificate purporting to be his, is genuine.

In attestation whereof I hereto subscribe my name and affix the seal of said appellate division of said court, the day and year above written.

BETRAM S. BLAISDELL, *Clerk.*

68 United States Circuit Court, Southern District of New York.

DANFORTH GEER, ARTHUR W. SMITH, THOMAS T. MATHIESON, and Others, Plaintiffs,
against
THE MATHIESON ALKALI WORKS, CASTNER ELECTROLYTIC ALKALI Company, and Others, Defendants.

UNITED STATES OF AMERICA,
State of Rhode Island, County of Providence, } ss:

John R. Gladding, being duly sworn, says: At all the times mentioned in the complaint in this action I was and am now a resident of the city of Providence, State of Rhode Island, and a citizen of said State. On August 1, 1901, and at all the times mentioned in the complaint, since about 1895, I was the treasurer and secretary of the defendant The Mathieson Alkali Works, which is, and always was, a corporation of the State of Virginia, having its principal office and place of business at Saltville, Va., where it has now, and for many years has had, large works for the manufacture of heavy chemicals, and has a capital investment of several million dollars.

For about three years prior to December 31, 1900, the Mathieson Alkali Works had a plant at Niagara Falls, in the State of New York, for the manufacture of caustic soda and bleaching powder by certain electrolytic processes patented by one Hamilton Y. Castner. Prior to 1897 the
69 Mathieson Alkali Works had acquired the Castner patents and built a plant for their operation at Niagara. This was not a large plant and was experimental in many respects. It was at the same time entirely different in principle from the company's plants in operation at Saltville, the latter being chemical, while at Niagara was electrical. This Niagara plant was the only plant and property of the Mathieson Alkali Works outside of the State of Virginia, and, about December 31, 1900, was sold and transferred, together with the Castner patents and electrolytic processes, to the Castner Electrolytic Alkali Company. It took possession shortly after the first of January, 1901, and has been the owner of and in possession and operating the same continuously ever since. This sale and transfer was under consideration for a long time prior to its conclusion, and was finally made after the whole matter had been submitted to the stockholders of the Mathieson Alkali Works at a special meeting called for the purpose, at which more than three-fourths of the entire capital stock issued and outstanding were present and voted unanimously in the affirmative. Due notice, in all respects, of this meeting was given to every stockholder of the company and there was not a dissenting vote at the meeting. The whole transaction was subsequently carried out in all respects as thus authorized by the unanimous vote of more than three-fourths of the stockholders. Since this meeting and sale I have heard and known of no dissenting stockholders except the plaintiffs in this action.

The sale of this Niagara plant and property was a business
70 transaction which has inured greatly to the advantage of the Mathieson Alkali Works and of its stockholders, and I know of no stockholders excepting the plaintiffs in this action who do not affirmatively approve of it.

I have read the foregoing affidavit of Mr. Edward E. Arnold and say that all the statements therein are true.

On August 1, 1901, when the copy of summons and complaint herein *were* delivered to Mr. Ely, the Mathieson Alkali Works had no property, agent or office in the State of New York, and was not engaged in business, and was not doing business within the State of New York, and had not been doing business within the State of New York for several months or since it had disposed of its Niagara plant. Its only office and place of business outside of Virginia was then and is now at Providence, Rhode Island.

JOHN RUSSELL GLADDING.

Subscribed and sworn to before me this 29th day of October, 1901.

EDWARD P. JASTRAM,
[SEAL.] *Notary Public.*

71 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, *Providence,* } *sc:*

Office of the clerk of the appellate division of the supreme court in Providence.

PROVIDENCE, *October* 29, *A. D.* 1901.

[SEAL.] I, Bertram S. Blaisdell, clerk of the appellate division of the supreme court of said State, in Providence, in the county of Providence, the same being a court of record, do hereby certify that Edward P. Jastram, Esq., is a notary public in and for said State, and as such was, at the time of signing said certificate to the annexed instrument, duly appointed and qualified, and authorized to administer oaths and take depositions and the proof of acknowledgment of deeds and other instruments; that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the said certificate purporting to be his, is genuine.

In attestation whereof I hereto subscribe my name and affix the seal of said appellate division of said court, the day and year above written.

BETRAM S. BLAISDELL, *Clerk.*

Endorsed: Please take notice that within are copies of additional affidavits in behalf of the Mathieson Alkali Works upon the motion now noticed for November 1st, 1901. Yours, &c., Agar, Ely & Fulton, appearing specially &c. To MacFarland, Taylor & Costello, Esqs., plaintiffs' att'ys.—U. S. circuit court, southern district of New

York. Danforth Geer, *et al.*, plaintiffs, against The Mathieson
72 Alkali Works, *et al.*, defendant-.—Additional affidavits and notice upon motion to dismiss.—Agar, Ely & Fulton, appearing specially for the defendants The Mathieson Alkali Works and The Castner Electrolytic Alkali Company, 31 Nassau street, New York city.—Received Oct. 30, 1901, copy of the within. MacFarland, Taylor & Costello, att'ys for pl'ffs.—U. S. circuit court, southern district of New York, Filed November 29, 1901, John A. Shields, clerk.

73 United States Circuit Court, Southern District of New York.

DANFORTH GEER ET AL., Plaintiffs,
against
THE MATHIESON ALKALI WORKS ET AL., Defendants. } In Equity.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

James M. Edwards, being duly sworn, says: I am a civil engineer by profession and a citizen and resident of the State of Tennessee. At the last annual meeting of the stockholders of the Mathieson Alkali Works which was held at Saltville, Virginia, September 5th, 1901, I was elected a director of the company and given charge of its plants and property at Saltville, Virginia, with my office for that purpose at Saltville. I had then been for some months in charge of these plants. Subsequently, and early in October, 1901, I was made the chief operating officer of the company with the title of president, and since then have administered its affairs and property at Saltville, Virginia, which have consisted principally in the maintenance and operation and enlargement now in progress of the company's plants there, for the manufacture of salt, soda ash, caustic soda, bicarbonate, and have had my office as such operating officer at Saltville, where I have been in attendance for that purpose, a portion of each month. At Saltville, the company has a large brick office building of its own, from seven hundred to one thousand em-
ployees, very large and extensive plants, and an investment
74 exceeding three million- of dollars.

My attention has been called to an affidavit, entitled in this suit, by one Willard U. Taylor, verified October 29, 1901, and I have carefully read a copy of it. Mr. Taylor is utterly mistaken in his statements regarding the Mathieson Alkali Works. The Mathieson Alkali Works has no office of any kind in the city or in the State of New York, has no clerks or employees, no books, no records, no bank account, no financial office or agency of any kind in the State of New York, and did not have on August 1, 1901, when I am informed this suit was commenced against it, and has not had, at any time since I have been one of its directors. The alkali works has not an office at No. 33 Wall street, New York city, and Mr. Taylor is mistaken in this as in other matters.

The financial and executive offices of this company are now and have been continuously for some years at Providence, Rhode Island,

where all its general books of account and records of every kind have been continuously kept, and where it has had its only financial office and headquarters and place of business, other than that at Saltville, Virginia. The business of the company is now, and has been, since I have been a director, and was on August 1st, 1901, entirely conducted either in Providence, Rhode Island or at Saltville, Virginia, and said company has not done business in any other places. Mr. Taylor's statements to the effect that it has now or has had since January, 1901, any office, books, records, employees or property, or done business within the State of New York, are without the slightest foundation in fact. Mr. Taylor is not correct in stating that the office of the president has been moved to New
75 York; the office of the president had been for years and on August 1st, 1901, was in Providence Rhode Island, and since October, 1901, has been and is now in Saltville, Virginia. I repeat that since I have been a director, and for more than six months last past, the Mathieson Alkali Works has had no office whatever, no books, no records, no clerks or employees, no property and has not done business within either the city or State of New York, and that any statement to the contrary is untrue.

JAS. M. EDWARDS.

Sworn to before me this 12th day of November, 1901.

NORMAN L. ZENO,

[SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in New York Co.

76 United States Circuit Court, Southern District of New York.

DANFORTH GEER ET AL., Plaintiffs,
against
THE MATHIESON ALKALI WORKS ET AL., Defendants. } In Equity.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Alfred Ely, being duly sworn, says: I have already made an affidavit in this suit, verified October 24th, 1901, upon the motion of the defendant, The Mathieson Alkali Works to set aside the summons, and say: That all the statements in said affidavit are true.

I am also one of the defendants in this action, as a director of the Mathieson Alkali Works.

In answer to my said affidavit, W. U. Taylor, one of the plaintiffs' attorneys, has filed an affidavit, verified October 29th, 1901, which I have read. In this affidavit W. U. Taylor attempts to controvert my statements of fact, and to insinuate upon what he styles "information and belief," a great variety of inferential allegations reflecting upon me and the statements which I have made, to an extent that calls for this reply.

With respect to Taylor's affidavit and its statements and inference, I say:

First. That so far as Taylor attempts to state, with reference to the defendant, Alkali Works, his affidavit is either upon "in-
77 formation and belief" or that he is "advised" by some one whose name does not appear, or is a statement of bad law or bad conclusions of law, and is, therefore, on its face, not entitled to credence, particularly, when, as in this case, his beliefs and guesses and "advices" are opposed to the positive statements upon actual knowledge of myself and of the officers and directors of the corporation, in affidavits filed in its behalf on this motion.

Second. The statement in Taylor's said affidavit on page 6, folios 16 to 18, as to the proceedings in another action there referred to, by one Conley against the alkali company, are not true and would so appear from the stipulations which he refers to but does not set forth. But they are of no consequence and wholly immaterial and impertinent on this motion.

Third. The letter referred to by W. U. Taylor in folio 24 of his said affidavit, was delivered to me. I did not refuse an answer, and Mr. Taylor's statement to that effect is untrue. I replied that we would send an answer by mail. This was done, and its receipt acknowledged by plaintiffs' attorneys.

Fourth. Mr. Taylor's statements in folios 6 and 23 of his affidavit that the defendant corporations are in default and that plaintiffs are, or have been, at any time entitled to a decree *pro confesso* are incorrect. Said defendants have not been in default at any time and all their proceedings have been prompt, timely and regular. The times and dates stated in my previous affidavit are in each case within the times prescribed by the statutes and the rules of this court. Mr. Taylor's insinuations and statements to the con-
78 trary are of the same mistaken and deceptive character as most of his other statements in said affidavit.

Fifth. It is not true that on August 1, 1901, when this suit was begun against the alkali company, it had any office or place of business in New York city or State, or that it maintained its organization and offices in the State of New York, or that it had any financial agency in this State, or that it had any books or records, or that it conducted its executive business in this State, and any statement to the contrary by whomsoever made, would be untrue. Moreover, the alkali works has not since August 1st had any office or financial agency, any books or records or conducted its business in the State of New York.

ALFRED ELY.

Subscribed and sworn to before me this 14th day of November, 1901.

[SEAL.] EDWARD A. FRESHMAN,
Notary Public, New York County.

Endorsed: United States circuit court, southern district of New York.—Danforth Geer *et al.*, plaintiffs, ag'st The Mathieson Alkali Works, *et al.*, defendants.—Affidavits in reply.—Agar, Ely & Fulton, appearing specially only for the defendants The Mathieson Alkali

Works, and Castner Electrolytic Alkali Company 31 Nassau street, New York city.—Received a copy of the within November 14, 1901. MacFarland, Taylor & Costello, pl'ffs' solicitors.—U. S. circuit court, southern district of New York, Filed Nov. 29, 1901, John A. Shields, clerk.

79 United States Circuit Court, Southern District of New York.

DANFORTH GEER ET AL., Plaintiffs,
against
THE MATHIESON ALKALI WORKS ET AL., Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Willard U. Taylor, being duly sworn deposes and says: I am a member of the law firm of MacFarland, Taylor & Costello, and one of the plaintiffs' solicitors in the above-entitled suit. Since the submission of the motion to set aside the service of the summons on the above-named defendant, and late last evening, the 14th of November, 1901, my office was served with an affidavit of James M. Edwards, and an affidavit of Alfred Ely. Instead of moving to suppress them as served without leave and out of time, I am advised to answer them: I refer in the first place to the affidavit of James M. Edwards. In this affidavit the said Edwards admits that he is president of the above defendant company as alleged in my former affidavit. He says he is a citizen and resident of the State of Tennessee; I do not know whether or not he is a citizen of that State, but it is untrue that he resides there. The New York directories for the last three years, including the present year give his house address, as No. 144 West 58th street, and his business as No. 33 Wall street, New York city. I have not consulted
80 the directory farther back than these three years, but I believe he has for many more years lived in this city, and during that time has been and now is private secretary to R. T. Wilson, in whose office at No. 33 Wall street, New York city, he performs his functions. The other day he was subpœnaed for examination before the referee in the case of Conley against the same defendant, and he disobeyed the subpœna, and did not appear. I do not know what clerical work he performs in connection with the defendant companies' affairs, but, I do know that his office is here, and that his residence is here, and that whatever work he does in connection with that company, is done here. For what I know he may make occasional visits to Saltville and Niagara Falls for one purpose or another, but it is already in proof before the referee in the case of Conley above mentioned, that the actual administration of the factories at these two places *are* under the direction of local people, and that the government of the above concerns, the Mathieson Alkali Works and the Castner Electrolytic Alkali Company, is carried on here exclusively through the board of directors meeting and acting here. And it will be noticed that this fact is not denied.

It further appears, and the fact is not disputed, that the entire product of the factories is sold by the firm or corporation of Arnold, Hoffman & Company, of this city; (Arnold, of that concern being the defendant, Edward E. Arnold in this suit) and having its place of business as above stated in this city. This affidavit would appear to be based not upon facts, but upon a theory, as to the necessary legal effect of the pretended deed of
81 the Mathieson Alkali Works to the Castner Electrolytic Alkali Company. The object of this suit is to set aside that conveyance as fraudulent and void; and that cause of action arose here, and must be disposed of here. Hence, as I am advised it is of no legal importance, how the affairs of the Mathieson Alkali Company may have been manipulated since the alleged fraudulent conveyance was made. The original of that conveyance was exhibited and offered in evidence before the referee at the last hearing, and it appeared that it bore no Government stamps it, therefore, possesses no legal validity; was not entitled to record, nor admissible to evidence. See s. 14 act 9, 1898.

The last meeting of the directors, as I am informed by the testimony of Gladding, the secretary of the company, before the referee, was held in this city, as required by the by-laws, in October of the present year, and it appears from the affidavit of Edwards that he was elected president at that meeting. If the fact is to be regarded as material, I say that a corporation must be regarded as doing business at the place where its directors live and meet; where its by-laws give it a home, and at which place all the powers of government exist and are exercised, and from whence all directions in regard to the management of the affairs of the corporation wheresoever situate must necessarily proceed. Moreover, it is untrue that the accounts of the said defendant company are not, and have not been kept in this city. The following is a copy of a signed memorandum of a meeting between Mr. Arthur W. Smith and myself with Mr. John G. Agar, of the firm of Messrs. Agar, Ely & Fulton, the attor-
82 neys for the defendant company at the office of Mr. Agar in June of last year.

Statement.

"On or about the 21st day of June, 1900 Arthur W. Smith and Willard U. Taylor, attended at the office of Agar, Ely & Fulton, No. 31 Nassau street, New York city, in order to procure a list of the stockholders of the Mathieson Alkali Works, and arrange for the obtaining, for the benefit of Mr. Smith, of a financial statement.

"We were shown into Mr. Agar's room, who gave us a glowing account of the Niagara works, stating that it was earning 12%, while the Virginia works were not very profitable; that he saw no reason why we should not have what we wanted, but that unfortunately Mr. Robinson, the book-keeper of the company, who kept the books in his office was away from town for a few days on his vacation, and as soon as he returned he would make arrangements with him to furnish us with a list of the stockholders and the financial statement.

"We left with the understanding that we were to receive a list of the stockholders, and the financial statement within a few days That period elapsed, and not receiving the statement we again called, and were met with technical objections to the effect that Mr. Smith was not a stockholder, but Mr. Agar promised
83 to overlook this technical point if he should receive from Mr. Mathieson, a cablegram, authorizing the giving out of this information to Mr. Smith. The cablegram was arranged for, and sent to Mr. Agar, or his firm, and although many telephone messages and messengers were sent we were met with repeated excuses based on one petty pretext or another, and the promised information was never given."

(Signed) ARTHUR W. SMITH.
(Signed) WILLARD U. TAYLOR.

I am informed and believe that Robinson is the accountant of the company, and has been for a long time, and that he gathers as such accountant from Saltville, Niagara Falls, Providence, Arnold, Hoffman & Company and all other needful sources, the information for a complete set of books, concerning the affairs of the defendant company, and has his office, unless it has been recently changed, in the office of the above-named attorneys, as Mr. Agar stated.

Accompanying my affidavit is the affidavit of the said Arthur W. Smith, of the firm of Messrs. Smith, Reckitt, Clarke & Company, an old and distinguished firm of public accountants in this city.

Every effort has been made to secure the attendance of Mr. Robinson before the referee on the reference above mentioned, but he has so far evaded the service of a subpœna.

Referring to the affidavit of Alfred Ely, I have simply to reaffirm in the most positive manner every allegation contained in my former affidavit precisely as therein made. Mr. Ely denies in the
84 "third" paragraph of his affidavit, that he refused an answer to the letter therein referred to. That this denial is mere prevarication, the following correspondence will show.

NEW YORK CITY, *October* 28, 1901.

Messrs. Agar, Ely & Fulton, 31 Nassau street, New York city.

DEAR SIRS: Will you kindly send us by the messenger, the names and addresses of the existing president and secretary of the Mathieson Alkali Works.

Very truly yours,
(Signed) MACFARLAND, TAYLOR & COSTELLO.

NEW YORK, *Oct.* 29, 1901.

MacFarland, Taylor & Costello, 65 Wall street, New York city.

DEAR SIRS: Replying to your inquiry of this date, we beg to advise you that Mr. Edward E. Arnold is still the executive head of the Mathieson Alkali Works, with the title of vice-president, and that Mr. John R. Cladding is performing the duties, and is the secretary under the title of assistant secretary, and that the only office

of the Mathieson Alkali Works, and the only place where it is doing business outside of the State of Virginia, is at Providence, Rhode Island, where it has been for many years.

Very truly yours,
(Signed) AGAR, ELY & FULTON.

85 NEW YORK, *October* 30, 1901.

Messrs. Agar, Ely & Fulton, 31 Nassau street, New York city.

DEAR SIRS: On the 28th inst. we sent you a note asking for the name of the president and secretary of the Mathieson Alkali Company, requesting a reply by the messenger, which you refused. Today we receive a letter from you giving the names of the vice-president, and of a person whom you say is "performing the duties of secretary." This is not a reply to our inquiry but an evasion.

Very truly yours,
(Signed) MACFARLAND, TAYLOR & COSTELLO.

I may add that on the reference in the Conley case above mentioned, Gladding, the secretary of the Mathieson Alkali Works, testified, and the fact is admitted, that the Mathieson Alkali Company owns the entire capital stock of the Castner Electrolytic Alkali Company, and that such capital stock was the sole consideration for the nominal conveyance of the Mathieson Alkali Works to the Castner Electrolytic Alkali Company.

WILLARD U. TAYLOR.

Sworn to before me this 16th day of November 1901.
KATHERINE J. WORTENDYKE,
[SEAL.] *Notary Public, New York Co.*

86 United States Circuit Court, Southern District of New York.

DANFORTH GEER ET AL., Plaintiffs,
against
THE MATHIESON ALKALI WORKS ET AL., Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Arthur W. Smith, being duly sworn deposes and says: I am a member of the firm of Smith, Reckitt, Clarke & Company, public accountants. I am a stockholder of the Mathieson Alkali Works and one of the plaintiffs in this suit. Wishing to obtain information concerning the affairs of that company, in June of last year, about the 21st, I believe, I visited the office of Messrs. Agar, Ely & Fulton, the attorneys of the company, supposing that the information could be obtained from them as attorneys of the company. The account of that interview is correctly set forth by Mr. Taylor in a copy of a memorandum signed by him and by myself, which copy is contained in the affidavit made by him on the 16th day of November, 1901, for use on the pending motion in this suit.

ARTHUR W. SMITH.

Sworn to before me this 18th day of November, 1901.
KATHERINE J. WORTENDYKE,
[SEAL.] *Notary Public, New York County.*

Endorsed: United States circuit court, southern district of New York.—Danforth Geer, *et al.*, plaintiffs, *vs.* The Mathieson Alkali Works, *et al.*, defendants.—Affidavit in rebuttal on motion to set aside service of summons.—MacFarland, Taylor & Costello, attorneys for plaintiffs, 63 Wall street, New York city.—Due service of the within aff'ts is admitted. Dated N. Y. November 18th, 1901.—U. S. circuit court, Filed Nov. 29, 1901, Southern district of New York, John A. Shields, clerk.

87

88 United States Circuit Court, Southern District of New York.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,
against
THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia; and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

The defendant, The Mathieson Alkali Works, having appeared specially for the purpose of moving to set aside the service of the summons and complaint.

Upon reading and filing the two affidavits of Alfred Ely verified respectively October 24th, 1901, and November 14th, 1901, the affidavits of Edward E. Arnold and John R. Gladding verified October 29th, 1901, and the affidavit of James M. Edwards, verified November 12, 1901, and the two affidavits of William U. Taylor, verified October 29th, and November 16th, 1901, after hearing counsel for the respective parties,

It is ordered that said motion be, and hereby is granted and the service of the summons of complainant herein upon said defendant, The Mathieson Alkali Works, be and hereby is set aside on the ground that the said defendant, being a foreign corporation, and not having an office or place of transacting business in the State of New York, service of the summons and complaint upon a resident director cannot confer jurisdiction upon the court over said defendant. And as to the said defendant, The Mathieson Alkali Works, the bill of complaint is dismissed.

89

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York.—Danforth Geer, *et al.*, plaintiffs, *vs.* The Mathieson Alkali Works, *et al.* defendants.—Order dismissing the summons on the

Mathieson Alkali Works.—MacFarland, Taylor & Costello, attorneys for plaintiffs, 63 Wall street, New York city.—U. S. circuit court, southern district of New York, Filed Dec. 16, 1901, John A. Shields, clerk.

90 United States Circuit Court, Southern District of New York.

DANFORTH GEER ET AL., Plaintiffs,
vs.
THE MATHIESON ALKALI WORKS ET AL., Defendants.

The order dismissing service of summons should be amended so as to read:

"It is ordered that said motion be and hereby is granted and the service of the summons and complaint upon said defendant, The Mathieson Alkali Works, be and hereby is set aside on the ground that the said defendant is a foreign corporation, which at the time of such service and for some time prior thereto had no place of transacting business in the State of New York and did transact no business therein. And as to the said defendant, The Mathieson Alkali Works, the bill of complaint is dismissed for lack of jurisdiction of the person of such defendant."

In all other respects the motion to amend is denied.

Dec. 30, 1901.

E. H. LACOMBE.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—Danforth Geer, *et al. vs.* The Mathieson Alkali Works, *et al.*—Opinion, Lacombe, C. J.—U. S. circuit court, southern district of New York, Filed Dec. 30, 1901, John A. Shields, clerk.

91 At a stated term of the United States circuit court for the southern district of New York, held in the United States court-house of the city of New York, borough of Manhattan, in said district, on the 27th day of December, 1901.

Present: Hon. E. Henry Lacombe, circuit judge.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Plaintiffs,
against
THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Richard T. Wilson, Edward E. Arnold, John G. Agar, Alfred Ely, John R. Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of said The Mathieson Alkali Works, Defendants.

An application upon notice having been made to this court on behalf of the defendant, The Mathieson Alkali Works, to resettle and amend the order made and filed herein in the office of the clerk

of this court on the 16th day of December, 1901, in accordance with a certain proposed order submitted with said notice. Now, after hearing Messrs. Agar, Ely & Fulton, appearing in support of said application, and Messrs. MacFarland, Taylor & Costello, in opposition thereto, it is

Ordered that the order made and filed herein in the office
92 of the clerk of this court on the 16th day of December, 1901, be, and the same hereby is amended, so that in the "third" and "fourth" paragraphs after the words "it is" the order shall read as follows:

"Ordered that said motion be, and hereby is, granted, and the 'service of the summons and complaint upon said defendant, The "Mathieson Alkali Works, be, and hereby is, set aside on the ground "that the said defendant is a foreign corporation, which, at the time "of such service, and for some time prior thereto had no place of "transacting business in the State of New York, and did transact "no business therein. And as to the said defendant, The Mathieson "Alkali Works, the bill of complaint is dismissed for lack of juris-"diction of the person of such defendant."

And it is further ordered that in all other respects the motion to amend be, and the same hereby is denied.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) United States circuit court, southern district of New York.—Danforth Geer, *et al.* plaintiffs, *vs.* The Mathieson Alkali Works *et al.* defendants.—Order dismissing service.—MacFarland, Taylor & Costello, attorneys for plaintiffs, 63 Wall street, New York city. U. S. circuit court, southern district of New York, Filed Jan. 3. 1902, John A. Shields, clerk.

93 Circuit Court of the United States, Southern District of New York.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Complainants,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

Your petitioners, the complainants herein respectfully represent that there is manifest error committed herein to the injury of the petitioner, by the final decree pronounced in this cause on November 29, 1901, setting aside service of the summons on the defendant, The Mathieson Alkali Works, and dismissing the bill against the said defendant, and in the interlocutory order pronounced on Oct.

14, 1901, refusing to remand the cause to the supreme court of the State of New York, in that by said interloctury order of Oct. 14th, 1901, the court decided that there was herein a separable controversy between the complainants, who are citizens respectively of the States of New York and New Jersey, and of the United Kingdom of Great Britain and Ireland, and the defendants, The Mathieson Alkali Works and the Castner Electrolytic Alkali Company,
94 which are both corporations organized under and citizens of the State of Virginia; and in that by said final order and decree of Nov. 29th, 1901, the court decided that the service of the summons herein upon Alfred Ely, who is a resident director of the defendant, The Mathieson Alkali Works, was not sufficient service to give the court jurisdiction over the said defendant.

Wherefore your petitioners considering themselves aggrieved pray that an appeal be allowed from said final order and decree and said interlocutory order to the Supreme Court of the United States upon said questions of jurisdiction, as authorized by section 5 of the act of Congress of the United States approved March 3, 1891, and that said question of jurisdiction may be certified to the said Supreme Court, and petitioners file herewith their bond for the sum of two hundred and fifty ($250.00) dollars, and pray that a transcript of the record, duly authenticated, upon which the above-mentioned order and decree were made may be transmitted with this appeal to the United States Supreme Court.

MacFARLAND, TAYLOR & COSTELLO,
Solicitors for Complainants,
No. 63 Wall Street, New York City.

Upon the foregoing petition of appeal it is ordered that the appeal to the United States Supreme Court be allowed upon the questions of jurisdiction, which it is hereby certified was the sole question arising herein, and that the record and proceedings herein be transmitted to said court.

E. HENRY LACOMBE,
U. S. Circuit Judge.

95 (Endorsed:) United States circuit court, southern district of New York.—Danforth Geer, *et al.*, plaintiffs, *vs.* The Matheison Alkali Works, *et al.*, defendants.—Petition and order allowing the appeal.—MacFarland, Taylor & Costello, attorneys for plaintiffs, 63 Wall street, New York city.—Receipt this day of a copy of the within is admitted. Dated N. Y. Dec. 20th, 1901. Agar, Ely & Fulton, appearing specially only U. S. circuit court, southern district of New York, Filed Dec. 21, 1901, John A. Shields, clerk.

96 Circuit Court of the United States, Southern District of New York.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Complainants,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

Assignment of Errors.

And now comes the complainants and appellants by their counsel and say that in the record herein there is manifest error in this, to wit:

I. The court erred in holding that a separable controversy existed between the complainants on the one side and the defendants, The Mathieson Alkali Works and The Castner Electrolytic Alkali Company on the other.

II. The court erred in refusing to remand the cause to the supreme court of the State of New York.

III. The court erred in setting aside the service of the summons.

IV. The court erred in holding that the defendant, The Mathieson Alkali Works, being a foreign corporation and not having an office or place of transacting business in the State of New
97 York, service of the summons and complaint upon a resident director cannot confer jurisdiction upon the court over said defendant.

V. The court erred in dismissing the bill of complaint against the defendant, The Mathieson Alkali Works.

Wherefore complainants pray that the order and decrees appealed from may be reversed with costs.

Dated New York city, December 17th, 1901.

MACFARLAND, TAYLOR & COSTELLO,
Solicitors for Complainants, No. 63 Wall Street,
New York City, Borough of Manhattan.

(Endorsed:) United States circuit court, southern district of New York.—Danforth Geer, *et al.* complainants, *vs.* The Mathieson Alkali Works, *et al.* defendants.—Assignment of errors.—MacFarland, Taylor & Costello, attorneys for complainants, 63 Wall street, New York city.—U. S. circuit court, southern district of New York. Filed Dec. 17, 1901. John A. Shields, clerk.

98 Circuit Court of the United States, Southern District of New York.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH, THOMAS T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn, Complainants,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia, and against Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works, Defendants.

Know all men by these presents, that, the Ætna Indemnity Company, having an office and usual place of business at No. 76 William street, in the city of New York, county and State of New York, is held and firmly bound unto the above-named defendants in the sum of two hundred and fifty (250) dollars, to be paid to the said defendants, for the payment of which well and truly to be made it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its corporate seal and dated the 16th day of December, in the year of our Lord, one thousand nine hundred and one.

Whereas, the above-named complainants are about to prosecute an appeal to the Supreme Court of the United States, to re-

99 verse the final decree pronounced in this cause on November 29th, 1901, setting aside service of the summons on the defendant, The Mathieson Alkali Works, and dismissing the bill against said defendant, and from the interlocutory order pronounced on October 14th, 1901, refusing to remand the cause to the supreme court of the State of New York, which decree and order were entered in the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such that if the above-named complainants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE ÆTNA INDEMNITY COMPANY, [SEAL.]
By WYLLYS BENEDICT, *Ass't Secretary.*

Sealed and delivered, and taken and acknowledged this 16th day of December, 1901, before me.

FLORENCE M. BRAGG,
Notary Public, Kings County.

Certificate filed in New York county.

Attest:
[SEAL.]

BEEKMAN HUNT,
Attorney-in-fact.

Affidavit, Acknowledgement, and Justification by the Ætna Indemnity Company.

UNITED STATES OF AMERICA,
Southern District of New York,
State and County of New York, } ss:

Before me personally came Wyllys Benedict, known to me to be the assistant secretary of the Ætna Indemnity Company, the corporation described in and which executed the annexed bond of
100 Danforth Geer, *et al.* as surety thereon, who being by me duly sworn, deposes and says that he resides in city of New York, State of New York, and that he is the assistant secretary of the Ætna Indemnity Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Connecticut; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond is the corporate seal of the Ætna Indemnity Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as assistant secretary of said company; and that he is acquainted with Beekman Hunt, and knows him to be the attorney-in-fact of said company; and that the signatuee of said Beekman Hunt subscribed to said bond is in the genuine handwriting of said Beekman Hunt, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of three hundred thousand dollars ($300,000).

WYLLYS BENEDICT.

Sworn to, acknowledged before me, and subscribed in my presence, this 16th day of December, 1901.

FLORENCE M. BRAGG,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county.

101 (Endorsed:) Circuit court of the United States, southern district of New York.—Danforth Geer, *et al.* plaintiffs, against The Mathieson Alkali Works, *et al.* defendants. Bond on appeal.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendants, of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Dec. 18, 1901, John A. Shields, clerk.

102 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To the Mathieson Alkali Works, the Castner Electrolytic Alkali Company, Edward E. Arnold, Robert T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as directors of the Mathieson Alkali Works, Greeting:

You are hereby cited and admonished to be and appear before a United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 15th day of January, 1902, pursuant to an order filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Danforth Geer *et al.* are complainants and you are directed to show cause, if any there be, why the decree in said action mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 17th day of December, in the year of our Lord one thousand nine hundred and one, and of the Independence of these United States the one hundred and twenty-fourth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Supreme Court.—Danforth Geer, *et al.* complainants *vs.* The Mathieson Alkali Works, *et al.* defend-
103 ants.—Citation.—MacFarland, Taylor & Costello, solicitors for compl'ts, 63 Wall St. N. Y.—Service of a copy of the within citation hereby admitted. Dated Dec. 20, 1901. Agar, Ely & Fuller, appearing specially &c.—U. S. circuit court, southern district of New York, Filed Dec. 21, 1901, John A. Shields, clerk.

104 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 103 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled Danforth Geer, *et al.* complainants, appellants against The Mathieson Alkali Works, *et al.* defendants, appellees as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of February in the

year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-sixth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JNO. A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Danforth Geer *et al.* compl'ts, appellants *vs.* The Mathieson Alkali Works, *et al.* def'ts, appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 18,434. S. New York C. C. U. S. Term No. 261. Danforth Geer, Willard F. Gay, Arthur W. Smith, *et al.*, appellants, *vs.* The Mathieson Alkali Works, The Castner Electrolytic Alkali Company, Edward E. Arnold, *et al.* Filed March 3rd, 1902.

FILE COPY

261

SUPREME COURT OF THE UNITED STATES

DANFORTH GEER, WILLARD E. GAY, ARTHUR W. SMITH ET AL., APPELLANTS,

against

THE MATHIESON ALKALI WORKS, THE CASTNER ELECTROLYTIC ALKALI COMPANY, EDWARD R. ARNOLD ET AL.

BRIEF ON BEHALF OF THE APPELLANTS.

W. W. MACFARLAND,
Of Counsel.

MACFARLAND, TAYLOR & COSTELLO,
Attorneys for Appellants,
Nos. 68-65 Wall Street,
Borough of Manhattan,
New York City.

Supreme Court of the United States.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH *et al.*,
Appellants,

AGAINST

THE MATHIESON ALKALI WORKS, THE CASTNER ELECTROLYTIC ALKALI COMPANY, EDWARD E. ARNOLD *et al.*

BRIEF ON BEHALF OF THE APPELLANTS.

Statement of the Case.

This is an appeal from a decree of the Circuit Court for the Southern District of New York in effect, dismissing the complainants' bill for want of due service of process.

The suit was commenced in the Supreme Court of the State of New York. It is a bill in equity, brought by stockholders of the defendant corporation against the company and its directors to set aside a conveyance of property of the corporation, on the ground that such conveyance was fraudulent and void or voidable as against its stockholders (pp. 3–15).

The Mathieson Alkali Works and the Castner Electrolytic Alkali Company joined in a petition to the State Court for a removal of the cause to the Circuit Court of the United States (pp. 18–20).

They say in their petition, that so far as they are concerned, the controversy is wholly between citizens of different States, *and that the controversy is a separable one*, and removable on that ground. The case could not have been removed on any other ground, because Geer and Gay, plaintiffs, and the defendants, Wilson, Agar and Ely, are citizens of the same State, and other complainants are aliens (pp. 2, 8).

The underlying proposition of the petition is, that in such a case the directors of the granting corporation, who, as agents of the stockholders, made the fraudulent conveyance in the name of the corporation, are neither necessary nor proper parties. Unless that proposition can be sustained, of course, the decree, which denied the motion to remand, must be reversed (Motion, p. 1; Order, p. 21).

The motion to remand having been denied and jurisdiction retained, the Mathieson Company thereupon moved to dismiss the suit for want of due service of the summons (p. 22). The Castner Company was not a party to this motion.

The motion was granted (p. 44), and the service of the summons was set aside. The effect of granting the motion was to dismiss the bill, as by a final decree. The material facts are undisputed, and they will be found set forth in two affidavits of Mr. Taylor (pp. 26, 40).

It appears that the suit was commenced in the Supreme Court of the State, August 1, 1901, by the sevice of the summons in accordance with Section 432 of the Code of Civil Procedure of the State (fols. 60, 61, 62).

About six days before the expiration of the time to answer, the defendant corporations filed a petition for removal (fol. 52).

There was an order of removal August 14, 1901, but the record was not filed in the Circuit by the defendants until more than two months later, when they were compelled to do so by a motion to remand (fol. 52).

That motion having been denied, then, on the eve of default for want of an answer, the Mathieson Company, as before stated, moved to dismiss the service of the summons, and the motion was granted. The cause of action was the fraudulent disposition of real property, situate within the State, and, therefore, it was a ground of action arising within the State, and of such a nature that it could be enforced nowhere else, except in the courts of the State, or a Federal Court sitting there (fols. 53, 54).

The statutes of the State expressly confer jurisdiction in such cases as explained in People *v.* Ballard, 134 N. Y., 269.

This fact alone is decisive in favor of the jurisdiction in connection with the fact, that service of process was made as required by the Code upon a resident director. But in addition, there is present every other possible element of jurisdiction. The City of New York is, by by-laws made, the elected home and seat of government of these corporations, who are separate only in name, their interests being identical, and the government of each the same (fols. 14–16, 54, 55).

The whole capital stock of the Castner Company, the nominal grantee of the Niagara plant, is owned by the Mathieson Company (fol. 85).

The product of the defendants' factories is all sold through a New York City agency, controlled by the defendant Arnold (fols. 80, 81).

There the defendants' accountant resides and performs his functions (fols. 82, 84, 86).

The very last meeting of the board of the Mathieson Company for the election of directors and appointment of executive officers was held in the City of New York, in accordance with the by-laws of the company (fols. 81, 82).

At that meeting James M. Edwards, a resident of New York City, was elected president of the company. He swears in an affidavit (fol. 73) that he is a resident of Tennessee, but it appears under his

own hand that this is untrue (see foot of p. 7 and top of p. 8). Besides, the New York City Directory has located him at No. 144 West Fifty-eighth street for years (fols. 79, 80).

At the same time, it is not of the slightest moment where Edwards lives.

It is to be regretted that the absence of any opinion prevents us from knowing, or even making an intelligent guess, as to the grounds on which the service of the summons in this case was set aside.

The affidavits for the Mathieson Company, say that it has no property in the State of New York, but it is inconceivable that decision should have been placed on that ground. It would be begging the very question to be decided on the merits. Confessedly, the company yesterday owned the Niagara plant. It owns it to-day, unless there has been a valid conveyance as against stockholders. Therefore, to assume that it had no property in the State would be to decide that the conveyance was valid without hearing the cause! The Court, certainly, could not have proceeded on that absurd notion.

Assignment of Errors.

"I.—The Court erred in holding that a "separable controversy existed between the "complainants on the one side and the de-"fendants, The Mathieson Alkali Works, and "The Castner Electrolytic Alkali Company, "on the other."

"II.—The Court erred in refusing to re-"mand the cause to the Supreme Court of "the State of New York."

"III.—The Court erred in setting aside the "service of the summons."

"IV.—The Court erred in holding that the "defendant, The Mathieson Alkali Works, "being a foreign corporation and not having "an office or place of business in the State of "New York, service of the summons and "complaint upon a resident director cannot

" confer jurisdiction upon the Court over said
" defendant."

" V.—The Court erred in dismissing the
" bill of complaint against the defendant The
" Mathieson Alkali Works."

ARGUMENT.

FIRST.

There is no separable cause of action stated in the complaint, and, therefore, no right of removal on that ground.

I.—Mr. Black, in his edition of Dillon on The Removal of Causes, states the result of the decisions on this point in the following words (Sec. 77):

> " The clause in question plainly contem-
> " plates the existence in the case of two or
> " more controversies, one of which is wholly
> " between citizens of different States, and is
> " so far separable from the rest of the litiga-
> " tion, that it can be fully determined be-
> " tween them."

The rule, as thus stated, has been frequently laid down by this Court.

Hyde *v.* Rable (104 U. S., at p. 409).
Frazier *v.* Jennison (106 *Id.*, 191).
Ayres *v.* Wiswell (112 *Id.*, 187).

See also

Broadway Ins. Co. *v.* Chicago Ry. Co. (101 Fed. R., 507).
Black's Dillon, Sections 143, 144.

In the application of the rule merely nominal parties are disregarded.

II.—The directors are not nominal and unnecessary parties, when by the bill they are expressly implicated in a breach of trust, an abuse of the corporate name and seal, and a fraudulent disposition of the property intrusted to their management, as they are in this case (pp. 14, 15), and where, as in this case, the bill prays for relief against them.

Seddon *v.* Virginia, etc., Co. (36 F. R., p. 6).

In that case, it is said (and the language is plainly applicable):

> "The charges in the bill and the prayer
> "for relief make a single controversy.
> "It is not a separable controversy, so as
> "to enable some of the defendants to remove
> "the cause into this court. The plaintiffs
> "have sued the defendant jointly, as they had
> "a right to do, and they must be treated as
> "joint defendants and real parties to the con-
> "troversy "(p. 9).

Hanover *et al.*, Bank *v.* Credits Commutation Co. (118 F. R., 110), is also exactly in point.

A petition for removal on the ground of a separable controvery, necessarily assumed the existence of a right of action in the complainants against the directors.

A right of action in this case, growing out of this *single transaction*, namely, the fraudulent conveyance of the property of the Company. Now, everything relating to that transaction is interwoven and interdependent. It cannot, therefore, be carved up into separate grounds of action any more than you could carve several human beings out of one. The truth is that the directors are the real defendants, the corporations, whose names they have used and abused, are merely legal entities or niduses, whose presence is legally essential for mechanical purposes.

Black's Dillon on Removal of Causes (Section 87).

The directors of a business corporation, which is practically a copartnership (Erwin *v.* Oregon Ry. Co., 27 Fed. R., 625; Morawetz on Corporations, Sections 973, 818), are in a very strict sense accountable agents.

It is submitted, then, that the cause was not removable, because there is no separable controversy in the record, and that it should have been remanded.

We now come to the second point, which is:

SECOND.

That it was error to hold the service of the summons invalid, and to set it aside, thus, in effect, dismissing the bill.

I.—On this point the case is—except in the feature mentioned below—identical with the case of Conley against The Mathieson Alkali Company, referred to in the statement of the case, and recently submitted to the Court. It would seem to be only needful to refer to that argument, so far as it goes, without repetition here.

II.—The case is substantially a suit in *rem*. The *res* is an extensive manufacturing plant, which the owners, the stockholders of the company, are seeking to reclaim. They may not succeed, but it is plain to common sense that they have a right to try to do it, and it is equally plain that if they have any remedy, it is only to be found in the courts of the State within which the property is situate. Personal service in such cases is never necessary. The action is not transitory, but local. It is the specific thing that has to be dealt with, and all that is needful in respect to procedure is such notice, by publi-

cation or otherwise, as general principles or local practice may prescribe. In such cases there is a *jus ad rem* to be worked out only where the thing is locally situate.

Waples on Proceedings in Rem., Chapters 56 and 57.

By the hypothesis underlying the decision below, we might have this state of things—indeed, we do have it substantially.

The entire manufacturing plant of a Virginia corporation is situate in the State of New York. The directors for the time being, make a fraudulent disposition of the whole property. It is decided, that the defrauded shareholders have no remedy in the courts of New York. We are not informed by any opinion, why they have not, or where else they are to seek for one. Certainly, one could not be found in a Virginia hamlet or jungle, or at the casual home of peripatetic officials in one State or another. The very nature of the cause of action makes it local, and, therefore, the case has nothing to do with the rules applicable to transitory rights of action.

III.—But every possible ground of jurisdiction exists, for, in addition to the decisive consideration stated above, service of process was made in precise accordance with the provisions of the Code of the State that are applicable to all actions (Section 432).

It is not at all true in any practical sense, that modern business corporations "dwell in the place of their creation."

Their promoters inspect the statutes of the different States, incorporate under those they deem most favorable for their purposes, and then establish themselves in some great centre of commercial activity, where, as in the present instance, its real home is established, and from where all the business is transacted; where by by-laws its very domicil is

established, and its directors are required to meet and act (p. 28).

Certainly, the juggling with jurisdictions and courts exhibited by the practice in this case is not to be sanctioned or encouraged without the most pernicious consequences to the administration of justice.

THIRD.

It is submitted, that the order or decree vacating the service of the summons, and, in effect, dismissing the bill, is plainly erroneous, and should be reversed.

W. W. MacFarland,
Of Counsel.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
APR 20 1903
JAMES H. McKENNEY,
Clerk.

No. 261.

DANFORTH GEER, ET AL.,

Plaintiffs in Error,

against

THE MATHIESON ALKALI WORKS,
CASTNER ELECTROLYTIC ALKALI COMPANY,

Defendants in Error,

EDWARD E. ARNOLD, RICHARD T. WILSON,
AND OTHERS,

Defendants.

Brief on behalf of The Mathieson Alkali Works,

Defendant in Error.

ALFRED ELY,
Of Counsel.

AGAR, ELY & FULTON,
Attorneys for Defendant,
MATHIESON ALKALI WORKS,
No. 31 NASSAU STREET,
New York City.

United States Supreme Court.

DANFORTH GEER, Willard F. Gay, Arthur W. Smith, Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn,
Plaintiffs in Error,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia,
Defendants in Error,

and against

EDWARD E. ARNOLD, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works,
Defendants.

Brief for Respondent, The Mathieson Alkali Works.

BRIEF ON BEHALF OF DEFENDANT, THE MATHIESON ALKALI WORKS.

Preliminary Statement of the Case.

This is a question of jurisdiction upon writ of error to the United States Circuit Court for the Southern District of New York,

NOTE.—Citations in this brief are to the printed pages of the record.

First, upon its denial of a motion by the plaintiffs to remand the suit to the New York Supreme Court, and

Second, upon its determination then that it had no jurisdiction of the defendant the Mathieson Alkali Works, by reason of which said Circuit Court set aside the summons and the pretended service thereof upon said Mathieson Company as null and void and of no effect, and dismissed the bill of complaint as to the Mathieson Company "for lack of jurisdiction of the person of such "defendant" (p. 46, fol. 92).

Upon the motion to remand the Circuit Court held that:

"Whatever relief the complainants may be entitled "to against the directors upon the facts alleged, they "would as to the two corporations be entitled to a de- "cree for retransfer of the property and an accounting "for damages sustained by the transfer. This is a con- "troversy separable from the one between complainants "and the officers and directors who effected the transfer, "and citizenship of the parties to that separable contro- "versy being such as the statute contemplates, the motion "to remand is denied" (p. 20–21, fol. 39).

Upon the motion to set aside the summons the Circuit Court found as a fact that the Mathieson Company at the time (August 1, 1901) of the pretended service of the summons upon it, was not doing business and had no place of business within the State of New York. It also had no property and no agent within said State, and the summons was set aside upon the same grounds and decisions of this Court, which were considered authoritative by the same Circuit Court in an action against the same defendant by one Conley, decided by it about the same time, and recently considered by this Court upon appeal (No. 238, October Term, 1902. Argued April 15, 1903).

As the question of jurisdiction involved upon setting aside the summons against the Mathieson Company in

this suit is upon facts similar to those found by the Referee in the case of Conley, for the purposes of this appeal, the chief question for review is, therefore, upon the denial by the Circuit Court of plaintiffs' motion to remand, on the ground that the controversy was not a separable one as between the two corporations defendants on the one side, and the individual defendants as directors of the Mathieson Company on the other.

Statement of Facts.

This is an action for a personal judgment against the Mathieson Company, directing the re-conveyance of certain property at Niagara Falls, New York, conveyed on December 31, 1900, to the Castner Company by the Mathieson Company. By this conveyance the Mathieson Company transferred all of its property of every kind and description, "all the buildings, apparatus, plant, stock in "trade, trade marks and property of every kind and de-"scription of said The Mathieson Alkali Works at Niagara "Falls, in the State of New York; together with the good "will of the business heretofore conducted by it at said "Niagara Falls" to the Castner Company, "as a going "concern free of all encumbrances except as to the con-"tinuing rents, royalties or charges under any existing "leases or agreements" pp. 10–11, fol. 20).

This conveyance was executed by the Mathieson Company at Providence, Rhode Island, as will be seen from the acknowledgment (p. 11, fol. 22), and was duly recorded by the Castner Company in Niagara County. Since that time the Mathieson Company "has had no property or "office and has not done business within the State of New "York" (p. 34, fol. 65).

On August 1st, 1901 (when the alleged service of summons in this action was made on the Mathieson Company), and for more than six months prior thereto, the said

Mathieson Company "had no place of business within the "State of New York, no property within the State of New "York, no office within the State of New York, and no "agent resident in the State of New York. The main "office and place of business of said defendant corpora- "tion is and always has been at Saltville, Virginia" (p. 23, fol. 45). Affidavits of Edward E. Arnold, President, and also of Mr. Ely, a Director, upon whom the pretended service of summons was made.

Upon the petition of both the Mathieson Company and the Castner Company (pp. 18–20) this suit was duly removed to the United States Circuit Court for the Southern District of New York upon the ground

"That in this action the only controversy affecting your "petitioners, or in which your petitioners are actually in- "terested, is between the plaintiff on one side and your "petitioners, the Mathieson Alkali Works and the "Castner Electrolytic Alkali Company on the other, and "that said controversy is wholly between citizens of "different States and can be fully determined as between "them and is separable from the controversy which the "plaintiffs have or pretend to have as against the other "defendants" (p. 19, VI.).

A motion (page 1, fol. 1), first, was then made by the complainants to remand, on the ground that it was not a separable controversy, which was denied by the Court (p. 21, fol. 41), with an opinion by Judge Lacombe, already quoted (*ante*, p. 2), and the complainants' appeal (pp. 46–47) from this decision and the order of the Circuit Court (pp. 46–47) presents one of the questions for review in this Court.

A motion, second, was then duly made by the Mathieson Company (pp. 22–25) to set aside the summons and its alleged service upon it, by delivery, August 1st, 1901, to Alfred Ely, one of its directors, similar in all respects to the motion to the same effect in the previous case of Conley *vs.* Mathieson Alkali Works above referred to.

This motion was granted by the Circuit Court, the summons in this action and its alleged service on the defendant Mathieson Alkali Works was set aside, and as to said defendant the bill of complaint was dismissed for lack of jurisdiction (p. 46, fol. 92).

From this final decree complainants have also taken their appeal to this Court (pp. 96–97, fols. 93–94), assigning as errors that the Court below erred.

(I.)—In holding that these was a separable controversy between the complainants and the defendants Mathieson & Castner Companies.

(II.)—In refusing to remand.

(III.)—In setting aside the summons as against the Mathieson Company.

(IV.)—In holding that the defendant Mathieson Alkali Works, being a foreign corporation, and not having any office or place of transacting business in the State of New York, and not doing business in the State of New York, "and transacting no business therein" (see the language of the order of the lower court, p. 46, fol. 92), service of the summons and complaint upon a resident director could not confer jurisdiction of the Court over said defendant.

As to the facts in this suit upon which the Circuit Court dismissed the summons there is no dispute, this case differing in that respect from the case of Conley *vs.* Mathieson Alkali Works, recently argued in this Court. For this reason any discussion of the facts is unnecessary upon this appeal.

The statements of the Mathieson Company are admitted by the plaintiffs to be true, as quoted above, that

"On August 1st, 1901 (when the summons herein was served on the Mathieson Company), "and for more than "six months prior thereto, it had no place of business "within the State of New York, no property within the "State of New York, no office within the State of New "York, nor any agent resident in the State of New York"

(p. 23, fol. 45, affidavit of Mr. Ely, the person served). "Since then" (January, 1901), "the defendant" (Mathieson Company) "has had no property or office, and has "not done business within the State of New York" (p. 31, fol. 66, affidavit of Mr. Arnold, President of the Company).

If, therefore, the motion to remand was properly denied, the case of Goldey *vs.* Morning News, 156 U. S., should control, and the decisions of the Circuit Court should be affirmed.

Argument.

Upon this appeal two questions are before the Court for review.

I.—Does the bill of complaint present a separable controversy as between the plaintiffs and the Castner and Mathieson Companies on the one hand, and the plaintiff and the individual directors of the Mathieson Company on the other. If this is answered in the affirmative, and the decision of the Circuit Court is sustained;

II.—Whether the Mathieson Company having no office or place of business, no property, no agent and not doing business within the State of New York, in August, 1901, or for more than six months prior thereto, service of the summons on Mr. Ely, a director resident in New York, and having no part in the mangement or affairs of the corporation, conferred any jurisdiction upon the Court over said corporation to render a personal judgment against said corporation.

First.

This second proposition has been so fully argued within a few days, before this Court, in a similar case against this same defendant (Conley *vs.* Mathieson Alkali Works,

No. 238, October Term, 1902, which does not differ from this case, except that the facts as to the relation of the Mathieson Company to the State of New York in July and August, 1901, when service in this case was made, are admitted, while in the Conley case the facts as to its relation to New York in April, 1901, when service in that case was made, were disputed), that further discussion seems unnecessary beyond recalling to the Court the argument of counsel for the Mathieson Company in the Conley case, and urging again upon this Court, that the rule in

Goldey vs. *Morning News*, 156 U. S., 518.
Wabash Western R.R. Company vs. *Brow*, 164 U. S., 271.
Barrow Steamship Co. vs. *Kane*, 170 U. S., 100,

applies also here in favor of the Mathieson Company and requires the affirmance of the order and decree of the Circuit Court in this case as also in the Conley case.

This is not substantially a suit *in rem* as indicated by plaintiff's counsel, but a personal suit against the defendant corporations to compel them to do a certain act. That this act is with reference to the title of a certain *res* by no means makes it an action *in rem*.

Nor does the claim of plaintiffs that the Mathieson Company *ought* to have title to and own the plant at Niagara make the Mathieson Company the owner for any purpose affecting the jurisdiction. Nor is the allusion of plaintiffs' counsel to Saltville as "a Virginia hamlet or jungle" anything more than a vain imagining on his part to obscure the fact that the Mathieson Company has property and plant in Saltville involving an investment of over $4,000,000 in hard cash and over fifteen thousand acres of land.

SECOND.

Upon this appeal the chief point for review is, therefore, the question arising upon the denial by the Circuit

Court of the plaintiffs' motion to remand on the ground that the controversy as against the defendant corporations is not separable from any controversy which the plaintiffs' claim to have against the other defendants. No other defendant except the Mathieson and Castner companies is a citizen of Virginia, and none of the plaintiffs is a citizen of Virginia.

Upon this point the only question is, whether the controversy alleged in the complaint against the two defendant corporations is separable from any controversy there may be against the individual defendants, who are sued only as directors of the Mathieson Alkali Works.

I.—The bill of complaint (pp. 3–14) is full of immaterial and irrelevant matter without place and improper in such pleading. Stripped of all such matter, the plaintiffs' complaint is as follows;

The plaintiffs were, on December 31, 1900, stockholders of the defendant Mathieson Alkali Works (p. 3, Paragraph II.), which was organized in 1892 for the purpose of manufacturing soda ash and chemicals (par. III.) and then proceeded to erect works for its business at Saltville, Virginia, which it "completed, put in operation and has since maintained" (p. 4, par. VII.).

In 1896 it made a contract with the Niagara Falls Power Company, at Niagara Falls, New York, and subsequently built a plant there (par. VIII.) for manufacturing caustic soda electrolytically under various patents (p. 9, fol. 18), and subsequently carried on one part of its business at Saltville, Virginia (par. VII.), and another part at Niagara Falls, New York (p. 4., par. VIII.).

On December 31, 1900, the defendant Mathieson Alkali Works sold and transferred all its plant at Niagara Falls, with the patents which it used there, to the defendant Castner Company (p. 8, par. XIV.). And plaintiffs allege that this conveyance was the result of a conspiracy

by the Directors of the Mathieson Alkali Works (p. 8 and 13), and was fraudulent and void (p. 13, par. XVI.), and for this reason "bring this action to set aside the aforesaid conveyance" (p. 13, par. XVI.), and for an accounting "by the individual defendants, directors of the said Mathieson Alkali Works, as agents and trustees of said Company, for their acts and doings in the premises" (p. 15, fol. 28).

This summarizes the complaint and is all there is of it, and states the controversies alleged and the relief sought by the plaintiffs therefor. It sets forth two distinct controversies or causes of action, one against the Mathieson Alkali Works and the Castner Company, to set aside the conveyance and for the re-conveyance of the property at Niagara Falls, and the other for an accounting by the various other defendants, as Directors of the Mathieson Company, "for their acts and doings in the premises."

So far as it alleges or prays relief against the Castner and Mathieson Companies, the action is to compel a reconveyance of the property by the Castner Company to the Mathieson Company, and incidently for an accounting by the Castner Company of "all its acts and doings in the premises."

So far as it alleges or prays relief against the individual defendants, it is merely an action for an accounting by them individually as directors.

It will thus be seen that the controversy against the defendant corporations is distinct and separable from that against the individual defendants, and that the presence of the individual directors is wholly unnecessary for any recovery or decree prayed for against the two corporations.

II.—In an action to set aside the conveyance to the Castner Company and for a reconveyance to the Mathieson Company, it cannot be seriously contended for a moment

that any other parties are necessary except the two companies, who alone are interested. Any decree made against these two would be final and conclusive, a complete determination of the entire controversy, and binding upon all officers, directors and agents of both companies, whoever they might be, whether parties to the action or not.

But the rule is well established that only *necessary* parties are to be regarded by the Court and that the residence of president and directors, co-defendants, does not bar the corporation's right of removal. (*Mayer* vs. *N. J. Steamboat Co.*, 24 Fed. R., 818.)

An injunction or decree against a corporation, its officers, directors and agents, as a class, is as effective and binding as if they were each named individually.

It is quite evident, therefore, that the presence of the co defendants, who are merely sued *as directors*, is wholly unnecessary for the determination of any controversy respecting the conveyance of the Niagara Falls plant by the Mathieson Company and its re-conveyance by the Castner Company, and that it is a separable controversy.

III.—Upon a consideration of the prayer for relief, it will be observed further, by the Court, that the relief prayed for as against the defendants Castner and Mathieson Companies is separate and distinct from that prayed for against the other defendants and can be granted or denied fully without the presence of any of the other defendants.

As against the Mathieson Company, the relief prayed for is:

(1) That the conveyance by the Mathieson Alkali Works to the Castner Electrolytic Alkali Company referred to in the complaint may be adjudged fraudulent, and may be vacated and set aside;

(2) That a receiver of said Alkali Works may be appointed;

(3) That the said corporation may make a disclosure, and to that end, plaintiffs may have access to the books.

As against the Castner Company, the relief prayed for is:

That the defendant Castner Electrolytic Alkali Company may be required to account in respect to all its acts and doings in the premises hereinbefore set forth, and to make good and pay over all damages * * * * * and be required to reconvey the above-described property and patents so wrongfully conveyed to it by said Mathieson Alkali Works as aforesaid.

Counsel for the defendant Companies submits that in the relief prayed for there is not the faintest shadow of any controversy against those Companies which for a moment occasions or involves the presence, as co-defendants, of the Directors of either Company, and the fact *that the Directors of the Castner Company* are *not made parties* to the suit is conclusive in the matter.

Stripped of unnecessary phraseology, so far as the two defendant Virginia corporations are concerned, the relief prayed for by the plaintiffs against them both may be briefly stated as follows:

That the Castner Company be decreed to re-convey to the Mathieson Company the property at Niagara Falls referred to in the complaint, and to account to the Mathieson Company for the operations of said property during the meantime.

So far as these two corporations are concerned, this is the entire controversy, and the utmost relief which the plaintiffs pray for, or could wish.

For convenience the prayer for relief is annexed to this brief as an exhibit, printed verbatim, but slightly rearranged, so that all the relief asked against each defendant is assembled in one paragraph.

IV.—The bill of complaint presents a separable controversy by the complainants against the Mathieson Alkali Works and the Castner Electrolytic Alkali Company, for a reconveyance, separate from the controversy by the plaintiffs against the individual defendants as directors, for an accounting of their individual "acts and doings." The decision of the Circuit Court denying the plaintiff's motion to remand should be affirmed. *Barney* vs. *Latham*, 103 U. S., 205.

The various cases cited by counsel for the plaintiffs in error are not applicable to the present case, for the reason that there is obviously in each of them but a single controversy involved.

In *Hyde* vs. *Ruble*, 104 U. S., 407, the suit was upon an alleged contract of bailment made by the defendants as partners. Of course there was no separable controversy.

In *Fraser* vs. *Jennison*, 106 U. S., 191, the action was founded upon a paper writing purporting to be a last will and testament, and the defendants were all contestants.

In *Ayres* vs. *Wiswall*, 112 U. S., 187, the action was to foreclose a mortgage, and the defendants were mortgage debtors.

The foregoing is equally true of the other cases cited by plaintiffs.

THIRD.

The decision, order and decree of the Circuit Court denying the plaintiff's motion to remand and setting aside the service of the summons on the defendant Mathieson Alkali Works should be affirmed.

April, 1903.

ALFRED ELY,
Of Counsel for Defendant
Mathieson Alkali Works.

Exhibit A.

PRAYER FOR RELIEF *verbatim* as in the Complaint, but re-arranged according to the relief asked severally against the various defendants.

"The plaintiffs pray";

As to The Mathieson Alkali Works.

"That the conveyance in the name of the said Mathieson Alkali Works above mentioned, may be adjudged to be fraudulent and void, as to the stockholders of the said company, and that the same may be annulled, vacated and set aside;"

"That a receiver of the said Alkali Works may be appointed;"

"That the plaintiffs may have, and the said corporation be adjudged and required to make a full disclosure in respect to all the premises herein set forth and alleged; and that to the end of such disclosure the plaintiffs may have access to and inspection of all the books, records and papers of the said corporation, including stock book;"

As to the Castner Electrolytic Alkali Company.

"That the defendant, The Castner Electrolytic Alkali Company, may be required to account in respect to all its acts and doings in the premises hereinbefore set forth, and to make good and pay over all damages sustained by the plaintiffs and by the said Mathieson Alkali Works by reason of such acts and doings,"

"and that the said Castner Electrolytic Company may be adjudged, and required to reconvey the above described property and patents so wrongfully conveyed to it in the name of the said Mathieson Alkali Works as aforesaid;"

"And that the said Castner Electrolytic Company may be adjudged and required to account for and pay over all the income, earnings and revenue of the said property since the date of such conveyance;"

As to the several individual defendants.

"That the defendants, directors of the said corporation, may be enjoined from making any further disposition of the property of the company;"

"That the individual defendants, directors of the said Mathieson Alkali Works, may be compelled to account as agents and trustees of the said compaay for all their acts and doings in the premises above set forth;"

"And that they may severally and respectively be adjudged and required to make good and pay to the said Mathieson Alkali Works, and to the plaintiffs, all loss and damage caused by their wrongful conduct in the premises as hereinabove set forth;"

"And that the plaintiffs may have such other and further relief as may be just and equitable, together with the costs of this action."

Supreme Court of the United States.

No. 261.—October Term, 1902.

Danforth Geer, Willard F. Gay, Arthur W. Smith, et al., Appellants,
vs.
The Mathieson Alkali Works, The Castner Electrolytic Alkali Company, Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russel Gladdings, et al., as Directors of the said Mathieson Alkali Works.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[June 1, 1903.]

This is an appeal from an order dismissing appellants' bill for want of due service of process.

The suit is in equity, and was commenced in the Supreme Court of the State of New York to set aside the conveyance made by the Mathieson Alkali Company to the Castner Electrolytic Alkali Company, on the ground that the conveyance was fraudulent. The directors of the former company were made defendants. On the petition of the defendant companies the case was removed to the Circuit Court of the United States for the Southern District of New York, on the ground that the controversy was wholly between citizens of different States, and separable as to them. The appellants made the motion in the Circuit Court to remand the case to the State court, but the motion was denied, the Circuit Court saying:

"Whatever relief the complainants may be entitled to against the directors upon the facts alleged, they would as to the two corporations be entitled to a decree for retransfer of the property and an accounting for damages sustained by the transfer. This is a controversy separable from the one between complainants and the officers and directors who effected the transfer, and citizenship of the parties to that separable controversy being such as the statute contemplates the motion to remand is denied."

The Mathieson Alkali Works (which we shall designate hereafter as the Mathieson Company) then moved the court to set aside the summons and the service thereof on the ground that it, the Mathieson Company, was at the time of the service of the summons a foreign corporation, and at that time, and for some time before, had no place of transacting business in the State of New York, and transacted no business therein. Affidavits were presented on the motion, and it was granted.

The appellants were plaintiffs in the court below, and we will so call them. They are stockholders in the Mathieson Company. Some of them

are citizens of the State of New York, some citizens of States other than Virginia, and some citizens of Great Britain and Ireland. It is alleged that the defendant corporations are Virginia corporations, and that each has an office and place of business in the city of New York, and that all but two of the directors of the Castner Electrolytic Alkali Company, hereafter called the Castner Company, resided there, and that the property, to recover which the suit is brought, is situated in the State of New York.

The purpose of the Mathieson Company was to manufacture salt, soda, soda ash, bleaching powder and other minerals, and to carry on a general merchandise business, and engage in agriculture and stock raising.

The bill is very voluminous, and it is enough to explain the contentions in the case to say that it recites the organization and history of the Mathieson Company; the erection and operation by it of a manufacturing plant at Saltville, Virginia; the leasing by it from the Niagara Falls Power Company of land and power at Niagara Falls, and the establishment of a plant there for the manufacture of the commodities mentioned in the charter of the company, and the carrying on of a profitable business. The bill alleges on information and belief that the defendants Arnold and Wilson are respectively the president and financial agent and manager of the company; the defendants Agar and Ely, their attorneys; Gladding, an employé of some sort, and the directors, other than Arnold and Wilson, are dummies without substantial interest in the company. That Arnold and Wilson have conducted the affairs of the company with great secrecy and for their own interests; that Arnold is a member of the firm of Arnold, Hoffman & Co., dealers in chemicals, in the city of New York, and by arrangements nominally between the firm and the company, but really between Wilson and the firm, the latter has had the exclusive sale and disposition of the products of the company since the organization, the details of which the plaintiffs are ignorant, because they have been kept secret from the stockholders. That, though dividends have been earned, none have been declared or paid, but have been appropriated by Arnold and Wilson. That they, with the other directors, have confederated and conspired to fraudulently dispose of and do away with substantially all of the property of the company, and have attempted to do so by means of the conveyance to the Castner Company set out in the bill; and, to better conceal their acts, have obtained no certificate from the Secretary of State or designated any person upon whom process can be served. That the Castner Company was promoted and organized by the defendants Arnold and Wilson, and is controlled by them, and they are chiefly interested in its affairs. That plaintiffs only obtained knowledge of the existence of that company within the past few days, and of the conveyance to it, but have no precise knowledge of its affairs, and believe that the great body of the stockholders of the Mathieson Company are ignorant of the existence of the Castner Com-

pany or of the conveyance to it. That by a communication from the Secretary of State it appears that the Castner Company was incorporated April 30, 1901, under the laws of Virginia, and that its officers consisted of a president, vice president and seven directors; and a provision in the articles of incorporation show that the defendants Wilson, Arnold and Agar are directors, and that Richard T. Wilson, Jr., a son of the defendant Wilson, is also a director. It is alleged that the other officers and directors are mere servants and instruments of the defendants Arnold and Wilson, and they created and organized the Castner Company as a means and contrivance to cheat and defraud the creditors and stockholders of the Mathieson Company by means of the conveyance to the Castner Company. The conveyance is set out in full. It recites that it is executed for and in consideration of one dollar, and other valuable considerations, and purports to convey certain patent rights and all of the property of the Mathieson Company in the State of New York. The bill also alleges the property conveyed was delivered to the Castner Company, and it is in the possession thereof; that the patents and property conveyed are "essentially necessary" to enable the Mathieson Company to carry on the business for which it was organized, and their conveyance in effect wholly destroys the business of that corporation and renders its capital stock utterly worthless, and deprives the creditors of the corporation, of whom there then were and are a large number, and for a large amount in the aggregate, of all remedy for the collection of their debts. That the conveyance is *ultra vires*, and the defendant directors are trustees and agents of and for the stockholders, and had no power to convey away the property and patents of the company essential to the carrying on of its business. And by reason of the facts alleged the defendant directors are unfit persons to have the charge and management of the affairs of the company, and that a receiver of the corporation should be appointed, and the defendants enjoined. That for the reasons set forth plaintiffs have not applied to the defendant, The Mathieson Company, to bring this action, being advised that its directors "would not be proper persons to prosecute an action in the name of the company, which was practically an action to redress frauds they themselves had committed."

The specific relief asked is stated in the opinion.

Mr. Justice McKenna, after stating the facts as above, delivered the opinion of the Court.

The facts and arguments by which it is attempted to sustain the service on the Mathieson Company are the same as were presented in the case of *Conley* v. *The Mathieson Alkali Works*, decided May 4 of this term. (*Ante*, page .) On the authority of the case the service in this must be held insufficient to give jurisdiction of the Mathieson Company, and the

order of the Circuit Court setting aside the service of summons must be affirmed if the case was properly removed to that court. And this depends upon the question whether the complaint exhibits a separable controversy between the plaintiffs and the companies.

A suit may, consistently with the rules of pleading, embrace several distinct controversies. (*Barney* v. *Latham*, 103 U. S. 212.) It was said in *Hyde* v. *Ruble* (104 U. S. 409): "To entitle a party to removal under this clause (second clause of section 2 of the act of 1875, same as second clause in the act of 1887) there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other." In other words, as expressed in *Fraser* v. *Johnson*, (106 U. S. 194,) "the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." And when two or more causes of action are united in one suit there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which if it had been sued on alone would be removable. (*Hyde* v. *Ruble*, *supra.*) See also *Ayer* v. *Wiswall*, (112 U. S. 187.) The application of these principles to the case at bar will be seen by the relief prayed for.

The relief prayed against the companies is as follows: Against the Mathieson Company, that the conveyance in its name be adjudged fraudulent and void, and that the same be annulled; that a receiver of its works be appointed; that its directors be enjoined from making any further disposition of its property; that it be required to make a full disclosure in respect to all of the premises set forth and alleged, and that the complainants have access to all books, records and papers, including the stock book. Against the Castner Company, That it may be required to account for all acts and doings in the premises set forth; to make good and pay all of the damages sustained by complainants to the Mathieson Company by reason thereof; that it be adjudged to reconvey the property so wrongfully conveyed to it in the name of the Mathieson Company; that it account for and pay all of the income, earnings and revenue of the property since the date of the conveyance.

To the relief asked against the companies were the directors of the Mathieson Company necessary parties? In *Winch* v. *Berkenhead, Lancashire & Cheshire Railway Co.*, (5 De G. & Sm. 562,) it was held, in a suit by a stockholder of the corporation in behalf of himself and all other stockholders, to restrain the performance of an *ultra vires* agreement, that it was not necessary that the directors should be made parties. It was said by the Vice Chancellor: "The act sought to be restrained is the act of the company.

It is quite sufficient if there is an order restraining the company. The company cannot act except by means of its officers. It appears to me that the suit is properly brought against the company alone."

Hatch v. *The Chicago, Rock Island & Pacific Railroad Company,* and *The Same* v. *Same,* (6 Blatch. 105,) were suits brought by the plaintiff in each in behalf of himself and all other stockholders of the defendant corporation, to restrain it from executing a contract which was alleged to be in excess of its powers. The plaintiff was a citizen of New York. The suits were brought in the Supreme Court of the State of New York. The individual defendants were directors of the corporation and resided in the State of New York, except one, who was a citizen of the State of Illinois. In the second suit one Denham was made a party, who was the treasurer of the company, but not one of its directors. His citizenship does not appear. The plaintiff in the second suit alleged that the committee of directors had determined to close the transfer office of the company in the city of New York, and to remove all of its books, moneys, securities and property beyond the jurisdiction of the court; that the defendants had refused to permit any transfer of the shares of stock on the books of the company. Judgment was prayed in the first suit for an injunction against the execution of the illegal contract, and of the acts which were alleged to be contemplated in the performance thereof. In the second suit judgment was prayed for the same injunction, and an injunction against the other acts alleged. On the petition of Tracey and the company the cases were removed to the Circuit Court for the Southern District of New York, and a motion was made to remand. The motion was heard by Mr. Justice Blatchford, who was then United States District Judge, who said:

"These suits, therefore, are suits brought in the State of New York, by Hatch, a citizen of New York, against the members of the company, all of whom are citizens of the State which created the company, and which is a State other than New York, and against Tracey, a citizen of Illinois, and against other defendants, who are citizens of New York."

And describing the suits, said further:

"All the relief that is prayed for in either suit is by injunction, except the prayer in the first suit for a receiver. All the relief by injunction is prayed for in respect to all of the defendants. No such relief is prayed for in respect to any defendant, other than the company, that is not prayed for in respect to the company. The suits are really, both of them, wholly against the company alone. The directors and the treasurer, who are its co-defendants, are merely its servants and agents, through whom necessarily it acts. It was not necessary or proper to make them parties to the suit at all. The injunctions prayed for and the injunctions issued, if issued against the company alone, and served on any director, or on the treasurer, would bind the person so served to obedience, and, even without such service, knowledge by the officer of the existence of the injunction against the company, would bind the officer to obedience. (*The People* v. *Sturtevant,* 5 Selden, 263, 277.) The directors and the treasurer are, therefore, not

real parties to the suits, but merely nominal parties. No personal demand is made against any one of them, nor is any personal accounting asked from any one of them, and it is only in his relation to the company, and in the official position that he occupies toward the company, that any one of them is made a party. The test of this is, that, if any one of the directors or the treasurer was to resign his office, he would necessarily cease, *ipso facto*, to be a proper party to the suit, and the plaintiff would be obliged to make his successor in office a party, and so on with every change. The reason for this would be that, there being no relief prayed against the individual in his individual capacity, and the injunction asked being to restrain him merely from doing or not doing what his official relation to the company alone enables him to do, or to refrain from doing, when such official relation ceases, the relief asked and the injunction issued become, as to him, utterly futile. This would not be the case where he was made a party defendant, jointly with the corporation of which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability, or in order to obtain a a discovery from him in regard to matters peculiarly within his knowledge. There, the dissolution of his official relation would not affect the propriety of his being retained as defendant. This view is conclusive to show that the entire real controversy in both suits, so far as it is shown by the prayer of the complainants, and which is the only guide the court can have, is between the plaintiff on the one side, and the company, as a corporate body, on the other. The plaintiff cannot, by joining as nominal defendants with the corporation, persons who are citizens of the same State with the plaintiff deprive the corporation of any right which it would otherwise have in respect to removing the cause into this court."

Heath v. *The Erie Railroad Company* came up before the same learned justice, and is reported in 8 Blatchford, 347, 413. It was a suit by stockholders against the railway company and Jay Gould, James Fisk, Jr., and Frederick A. Lane, who were directors of the company. The object of the suit was to restrain *ultra vires* acts. The bill prayed for an injunction for a receiver, for an accounting by Gould, Fisk and Lane of the profits made by them, and that they "make payment and compensation to the company, for the benefit of the plaintiffs, and the other *bona fide* shareholders, to the full extent of all such profits, benefits, gains and advantages, and of such damages, losses and injuries." The bill was demurred to, on the ground, among others, that the other directors, fourteen in number, were not made parties to the bill. The court overruled the demurrer. The main part of the opinion, which was very elaborate, is devoted to the consideration of the right of the stockholders to maintain the suit, which right was sustained on the authority of many cases. Of the ground of demurrer that the other directors had not been made parties, the court said:

"The objection that such fourteen persons ought to be made parties, as appearing to have been directors when the bill was filed, for the reason that the bill asks for an injunction against the corporation and for a receiver of the corporation, is not well taken. The relief so asked is against the corporation. If such fourteen persons were made parties, they

would be merely nominal parties and not real parties, in respect to any relief that is asked against the corporation; and no relief is asked as against them, except in respect to the matter of the classification, which has already been disposed of. This question was fully considered in the case of *Hatch* v. *The Chicago, Rock Island & Pacific R. R. Co.*, (6 Blatchf. C. C. R. 105, 114 to 116.)"

It was, however, said by Lord Cairns in *Ferguson* v. *Wilson*, (L. R. 2 Ch. 90,) and it was held in *Clinch* v. *Financial Corporation*, (L. R. 4 Ch. 117,) that it was proper in a suit by a stockholder to restrain *ultra vires* acts of a corporation to join as defendants the directors of the corporation. This ruling is reconcilable with the other cases. The reconcilation lies in the distinction between proper and indispensable parties in view of the statute providing for the removal of causes to the Federal courts. (*Barney* v. *Latham*, *supra*.)

But relief is prayed against the individual defendants as follows:

"That the individual defendants, directors of the said Mathieson Alkali Works, may be compelled to account as agents and trustees of the said company for all their acts and doings in the premises above set forth; and that they may severally and respectively be adjudged and required to make good and pay to the said Mathieson Alkali Works and to the plaintiffs all loss and damage caused by their wrongful conduct in the premises as hereinabove set forth."

If it be conceded that in a suit which seeks such relief the Mathieson Company is a necessary party, it is certain the Castner party is not. Besides the relief is distinct from—separable from, to keep to the language of the cases—that which is sought as a result of the grounds of suit against the companies.

It follows from these views that the bill exhibits a controversy between the plaintiffs and the defendant companies, to which the individual defendants are not necessary parties, and the case was rightfully removed to the Circuit Court.

The order of the latter court setting aside the service of summons on the Mathieson Company, and dismissing the bill for want of jurisdiction of that company, is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.